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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 809

WALTER J. SAWYER, *Petitioner,*

vs.

MAX A. BARCZAK, Sheriff, Milwaukee County, Wisconsin, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Petition for Writ of Certiorari	1
The Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	22
I. The Court of Appeals Has Rendered an Erroneous Decision on an Important Question Which Deprives Petitioner of Due Process of Law, Which Conflicts With Decisions of the Supreme Court of the United States, Other Circuit Courts of Appeal, and of the Highest Courts of Some of Our States and With Other Applicable Decisions	23
II. The Obvious Unreasonable Delay in Bringing Petitioner to Trial, Over His Objection, Resulting to His Prejudice, in the Use of Perjured Testimony to Obtain a Conviction, Deprived Petitioner of a Speedy Trial and His Liberty Without Due Process of Law. The Question of Whether Convictions, Obtained by Denials of Constitutional Guarantees, Should Be Permitted to Stand Is of Such Great Importance to the Administration of Criminal Justice That Certiorari Is Warranted and Should Be Granted to Resolve the Question in the Public Interest	35
III. The Court of Appeals Ruling That the District Court Erroneously Excluded Vital Testimony Proving Perjury and the Substitution by the Court of Appeals of Its Findings and Conclusions for Those of the District Court, Who Heard the Witnesses but Excluded Their	

Page

Testimony from Consideration, Without Remanding the Case to the District Court for a New Trial and Additional Findings and Conclusions After Reconsideration of the Excluded Testimony Constitutes a Denial of Procedural Due Process of Law to Petitioner 43

Conclusion 47

Appendix 48

TABLE OF CASES CITED

Chambers v. Florida, 309 U. S. 227 33
Crawford v. United States, 212 U. S. 183 46
Dausuel v. Dausuel, 90 U. S. App. 275, 276, 195 F. 2d 774 27
Dickoff v. Dewell, 152 Fla. 240, 9 So. 2d 804 40
Drewniak v. State, 239 Wisc. 475, 1 N.W. 2d 899 16
Ex Parte Altman, 34 F. Supp. 106 40
Ex Parte Miller, 66 Colo. 261, 180 P. 749 40
Harris v. Municipal Court, 209 Calif. 55, 285 P. 699 .. 40
In re Begerow, 133 Calif. 349, 65 P. 828 40
Johnson v. Zerbst, 304 U. S. 458 45
Jones v. Commonwealth of Kentucky, 97 F. 2d 234, 338 ..... 27, 28
Lee v. Mississippi, 332 U. S. 742 33
Leyra v. Denno, 347 U. S. 556 ..... 22, 23
Lesenba v. California, 314 U. S. 219, 236 30
Little v. United States, 73 F. 2d 861, 866 46
McCandless v. United States, 298 U. S. 342 45
Miller v. United States, 120 F. 2d 968 46
Mooney v. Holohan, 294 U. S. 103 ..... 29, 30
Moore v. Dempsey, 261 U. S. 86 45
People v. Molinari, 23 Calif. App. 2d Supp. 761, 67 P. 2d 767 40
Petition of Provoo, 76 Sup. Ct. 101, 17 F.R.D. 183 .... 38, 40, 41
Remington v. United States, 343 U. S. 907 32
Sawyer v. State, 263 Wisc. 218, 226, 56 N.W. 2d 811 ... 7
Sawyer v. State, 266 Wisc. 494, 63 N.W. 2d 749 ..... 8, 36
Sawyer v. State, October Term, 1954, No. 279 ..... 8, 9
Screws v. United States, 325 U. S. 91, 94 23
Sparks v. United States, 241 F. 777 46

Page

State v. Krause, 260 Wisc. 313, 50 N.W. 2d 439 6
State v. Maurignos, T. U. P. Charlt., Ga., 24 40
State v. Phil, 1 Stew., Ala. 31 40
State v. Sims, 1 Tenn. 253 40
State v. Stalnaker, 2 Brev., S. C. 44 40
Stein v. New York, 346 U. S. 401 33
United States, ex rel, Almeida v. Baldi, 195 F. 2d 820 32
United States v. Fox, 3 Mont. 512 40
United States v. Gamble-Skogmo, 91 F. 2d 372 46
United States v. McWilliams, 69 F. Supp. 812; 163 F. 2d 695 41
United States v. Ragen, 86 F. Supp. 382, 387 32
Von Feldstein v. State, 17 Ariz. 245, 150 P. 235 40
Walker v. Johnston, 312 U. S. 275 45
White v. Rindskopf, 43 Wisc. 350 34
Williams v. United States, 341 U. S. 97 23
Woolomes v. Heinze, 198 F. 2d 577 32
Yule v. State, 16 Ariz. 134, 141 P. 570 40

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Title 28 U. S. Code Annotated, Sections 1254 and 2101 2
United States Constitution, V Amendment 4, 5
United States Constitution, VI Amendment 5
United States Constitution, XIV Amendment 4, 42
Wisconsin Constitution, Article 1, Section 7 4
Wisconsin Statutes, Section 356.06 ..... 5, 6

MISCELLANEOUS CITED

Cooley, Constitutional Limitations, 8th Ed., Vol. 1, p. 645 39
The Federalist, No. 84 39

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Walter J. Sawyer, a citizen of the United States and a resident of Milwaukee, Wisconsin, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered January 12, 1956, which erroneously affirmed the final judgment of the District Court of the United States for the Eastern District of Wisconsin, discharging a writ of

habeas corpus issued in petitioner's favor and remanding petitioner to the custody of the respondent for the purpose of having petitioner jailed to serve a sentence of imprisonment imposed upon him by judgment of conviction of the Municipal Court of Milwaukee, Wisconsin, entered July 31, 1953, notwithstanding that petitioner had been denied his right to due process of law given him by the Fourteenth Amendment to the United States Constitution because his conviction had been obtained by the use of perjured testimony and he had been denied a speedy trial.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the opinion of the United States District Court for the Eastern District of Wisconsin entered on January 27, 1955 (R. 25-44) 129 F. Supp. 687, has not yet been reported and appears in the Appendix (App. p. 48).

JURISDICTION

The decision of the Court of Appeals was entered on January 12, 1956 (App. p. 48). A petition for rehearing was timely filed by your petitioner in the same Court and was denied on March 1, 1956 (App. p. 60). The mandate of the Court of Appeals, under its Rule 25, is stayed for a period of thirty (30) days from March 1, 1956 to permit petitioner to file a petition for writ of certiorari to this Honorable Court (App. p. 61). Jurisdiction of this Honorable Court is invoked under Sections 1254 and 2101 of Title 28, United States Code Annotated and Rule 22 of this Honorable Court.

QUESTIONS PRESENTED

1. Whether a secret deal entered into by a prosecutor with the chief prosecution witness, a felon, which results in the use by the prosecution of perjured testimony of this witness, wherein the prosecution gave immunity to the witness on two charges involving petitioner and dismissed three other criminal charges against the witness unrelated to petitioner, and the handling of another criminal charge, unrelated to petitioner, in an unauthorized and unusual manner as to assure the witness parole and freedom in exchange for giving perjured testimony to convict petitioner, and where that deal was unsanctioned by the Court admitting the prisoner as a witness, and the existence of the deal was withheld from the Court and the jury because the prosecutor denied making such a deal, deprived petitioner of a fair and impartial trial contrary to the due process provisions of the Fourteenth Amendment to the Federal Constitution?

2. Whether knowing use of perjured testimony by the prosecutor was the only basis upon which petitioner could prevail in a habeas corpus proceeding instituted by him, although the perjured testimony was used to obtain a conviction?

3. Whether petitioner, who was indicted in Municipal Court of Milwaukee, Wisconsin on April 25, 1950 but was not brought to trial until April 15, 1952, nearly two years later, who had, during that period, conscientiously sought to have his case brought on for trial and whose defense was prejudiced by this delay, which resulted in the use of the perjured testimony against him, is entitled to dismissal of the indictment on the ground that he has been denied due process of law by being deprived of a speedy trial?

4. Whether the Court of Appeals should have remanded the case to the District Court at the very least for rehearing because of the Court of Appeals' ruling that very important and vital testimony proving perjury was erroneously excluded by the District Court because this vital testimony, in the opinion of the Court of Appeals rather than the trial court, while proving perjury did not prove that the prosecutor knew or should have known that the prosecuting witness's testimony was false and that the exclusion, therefore, of such vital testimony was not prejudicial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the 14th Amendment are:

> "Sec. 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

The pertinent provisions of Sec. 7, Article I of the Constitution of the State of Wisconsin are:

> "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law."

The pertinent provisions of the Fifth Amendment to the Constitution of the United States are:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

The pertinent provisions of the Sixth Amendment to the Constitution of the United States are:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . ."

The pertinent provisions of Sec. 356.06, Wis. Stats. are:

> "Time of Trial on Change of Venue. On a change of venue either party may move for trial at the current term. If such motion is not made or is denied, the defendant shall appear for trial at the next term. If the jury for the term has been discharged, the court may order the jurors resummoned; and in case no jury has been summoned the court may summon the jurors of the previous term."

STATEMENT OF THE CASE

On April 25, 1950, petitioner, Sawyer, a reputable automobile dealer in the City of Milwaukee, was indicted in the Municipal Court of Milwaukee, Wisconsin, on charges he gave a discount worth $600 on a 1949 Buick automobile (Count 1) and gave $3,000 in cash (Count 2) to one Albert J. Krause, an alderman of the City of Milwaukee, with the intention of influencing Krause to prevent demolition of a building occupied by petitioner's corporation. Krause, following the indictment of petitioner, furnished an affidavit (R. 177) and made numerous statements clearing petitioner of the charges (R. 6), was himself indicted on other bribery charges, having nothing to do with petitioner; and was imprisoned after conviction

on one of these other charges on June 8, 1951 (R. 6). (*State* v. *Krause*, 260 Wis. 313; 50 N. W. (2d) 439.)

While Krause was in jail, a few days before petitioner was brought to trial and some two years after the return of the indictment in petitioner's case, Krause turned state's evidence under a deal he made with the prosecution, agreed to and did testify against petitioner after arrangements had been made with the prosecutor which assured Krause that two other bribery charges against him would be dropped, and they were, in fact dropped. (R. 6). Shortly thereafter, and under this deal made between the prosecution and Krause, three additional charges were annulled and a 6th handled in an improper way (suspended the imposition of sentence R. 188) so as not to prevent Krause obtaining parole (R. 6). The disposition of these criminal charges against Krause permitted the granting of parole and he obtained parole and his freedom. (R. 6). Under Wisconsin law, Krause could not become eligible for parole until all criminal actions against him had been disposed of in his favor.

On February 27, 1951, the first trial judge was assigned to petitioner's case, petitioner having filed an affidavit of prejudice on February 7, 1951 against another judge. This action not only caused no delay but, under controlling Wisconsin law, (Wis. Stats., Sec. 356.06), petitioner's trial should have begun in the following term, 30 days later. Notwithstanding the statutory mandate, petitioner's trial was delayed by the prosecution until April 15, 1952. On February 28, 1951, petitioner moved in the trial court for dismissal of the indictment on the ground that there had been an unreasonable delay in bringing him to speedy

trial (R. 6). This motion was denied (R. 6). At that time, more than 3 full terms of court had elapsed. The prosecution presented no tenable grounds to excuse its failure to bring the case to trial, notwithstanding that petitioner answered ready for trial. Notwithstanding that his attorneys sought the prosecution of the action with the prosecuting attorney and with the clerk of the trial court, further proceedings in the case were continued to the April 1951 term. (R. 7).

On May 5, 1951, petitioner was arraigned and pleaded not guilty, and it appears from the affidavits of his attorneys that the trial court was advised that petitioner was ready for trial. Yet, the prosecution answered they were not ready for trial, and, at the prosecution's request, the trial was adjourned (R. 7). On June 5, 1951, petitioner filed a written waiver of trial by jury together with a consent to an immediate trial, but the action was not brought on for trial until April 15, 1952. Nine terms of the Municipal Court of Milwaukee had elapsed between the indictment and the trial. Notwithstanding petitioner's request for trial, the prosecution was further delayed and the case was not tried until April 15, 1952. Petitioner at no time made any request for a continuance and the continuances were all had at the insistence of the prosecution (R. 7). In the trial which commenced April 15, 1952, because of the perjured testimony of Krause, petitioner was convicted and sentenced to imprisonment on May 10, 1952. Petitioner appealed to the Supreme Court of Wisconsin, the judgment of conviction was reversed, and a new trial ordered. While the Supreme Court of Wisconsin failed to direct dismissal of the action, the opinion held (Sawyer v. State, 263 Wis. 218, 226):

> " . . . there would seem to be merit to defendant's contention that the delay from April 25, 1950, (the date of the return of the indictment) until April 15, 1952, (the date of commencement of trial) did not comply with the constitutional provisions requiring a speedy trial. . . ."

Petitioner then filed with this Honorable Court a petition for writ of certiorari. (*Sawyer* v. *State*, October Term, 1953, No. 147), but this petition was withdrawn because a new trial had commenced in the Municipal Court. The retrial of this action against petitioner commenced in July 1953, at which time petitioner renewed his motion to dismiss the indictment for failure to grant a speedy trial. The motion was denied; the trial proceeded; and again, on the perjured testimony of Krause, a verdict of guilty and judgment thereon were entered against petitioner on July 31, 1953. Petitioner again appealed the judgment to the Supreme Court of Wisconsin. During both trials and the appeals thereof, the prosecution withheld information concerning the deal arrangements the prosecution had made with the chief prosecuting witness, Krause. On the second appeal, the judgment of conviction against petitioner was affirmed. (266 Wis. 494; 63 N. W. (2d) 749) (R. 9).

The Supreme Court of Wisconsin erroneously held, without any evidence whatever in the record to support it, that petitioner acquiesced in the delay of his trial (R. 9). Petitioner sought a rehearing and pointed out to the Supreme Court that he had taken affirmative steps to obtain a trial; that the record was barren of any fact or circumstance which would support this conclusion of the Court; that petitioner had never entered into any agreement that his trial should be

delayed until after the state had obtained a final decision in its conviction of Krause; and he renewed his request that the indictment be dismissed and he be discharged because he had been denied a speedy and fair trial which was guaranteed him by the Constitutions of Wisconsin and the United States.

On June 8, 1954, the Supreme Court of Wisconsin denied petitioner's motion for rehearing. Thereafter, petitioner filed his petition for a writ of certiorari with this Honorable Court. (*Sawyer* v. *State*, October Term, 1954, No. 279). This petition was denied without opinion by this Honorable Court, as was petitioner's petition for rehearing (R. 10). On return of the record from the Supreme Court of Wisconsin to the Municipal Court of Milwaukee, petitioner was returned to the custody of the respondent, sheriff of Milwaukee County.

On December 10, 1954, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin (R. 4-15). All of the facts alleged in this summary statement substantially were set forth in that petition (R. 4-15). The petition alleged among other things that the petitioner's conviction had been obtained by the use of perjured testimony and sought petitioner's discharge because he had exhausted all remedies available to him in the courts of the State (R. 7-8, 13-14). Attached to the petition were affidavits of trial counsel for petitioner, which showed that petitioner was always ready for trial, filed a waiver of jury trial, consented to immediate trial, and that all adjournments of the trial were at the request of the prosecution because the prosecution "was not ready for trial"; and that the petitioner at no time made any request

for a continuance or an adjournment of the trial, and yet, notwithstanding this, the trial was delayed until April 15, 1952 (R. 15-17), which deprived petitioner of his constitutional right to a speedy trial to his prejudice. The District Court issued a writ of habeas corpus requiring respondent to produce petitioner before the court on December 10, 1954 (R. 18-19) and released petitioner on bail. A hearing was held in the District Court for the Eastern District of Wisconsin. At the outset of this hearing, the prosecution again withheld from the court the terms of the "deal" it had made with Krause to get him to testify against Sawyer (R. 21-24).

After the records of the trials of petitioner were subpoenaed, produced and received in evidence, the following new evidence was adduced in support of the petition:

Vern H. Knoll, an inmate of the state prison where Krause was also a fellow inmate, testified that he saw and talked with Krause 40 or 50 times while in prison. Many of these conversations ranged from an hour to two hours in length. Krause always discussed with him the Sawyer matter. Krause found it difficult to do time in prison, had difficulty making the adjustment and was deeply worried about his wife. Krause was in tears on several occasions and told Knoll that he did not receive a bribe from Sawyer and pointed out an instance where the records would show that he voted against Sawyer's interests which would indicate that he had not received a bribe. On other occasions, Krause told Knoll that he did not receive money from Sawyer, and told Knoll this so many times that Knoll became convinced that he did not receive money from Sawyer. Krause read letters from his

wife to Knoll and told him that he was scared because the prosecutor was riding him hard in regard to the Sawyer case and was holding other counts over his head. The conversations also involved parole, with Krause stating that he was apprehensive about obtaining parole and was precluded thereform because of the criminal counts still against him. At Krause's insistence, Knoll recommended a new attorney to Krause, one Paul Hemmy, Jr. After contacting Hemmy, Krause told Knoll that he now was going down to Milwaukee and testify that Sawyer gave him bribe money. Knoll was thunder-struck, mad and angry and accused Krause of trying to get Mr. Hemmy to wash his dirty linen. Krause defended the perjury he was going to give in the Sawyer trial on the ground there was no other way out; that his wife was going "crazy" and "wild", and the prosecution had the hammer hanging over Krause's head. Krause never defended his changed and perjured testimony on the ground that he had actually accepted a bribe—only on the grounds of necessity to get out of prison. (R. 60-74).

Paul A. Hemmy, Jr., an attorney of excellent standing, reputation and experience in Wisconsin, testified that he received a letter from Krause while Krause was in the Wisconsin State Prison. The letter was received in evidence. After receiving this letter, Hemmy went to the prison and interviewed Krause. His visit was registered on the prison records. This occurred in February of 1952. Krause advised Hemmy that he was in prison serving under a bribery conviction and wanted Hemmy to go and see the prosecutor, McCauley, and see whether some arrangements could be made to get rid of outstanding criminal

counts against him. Krause appeared much disturbed and told Hemmy that there were outstanding counts against him involving Sawyer and two or three other matters. On further questioning by Hemmy, Krause informed him that he had filed or sworn to something in the Sawyer case that Sawyer did not give Krause any money and Krause also told Hemmy that Sawyer didn't in fact give him any money, but, if necessary, he would testify that Sawyer gave him money in order to obtain his freedom because he would do anything to gain his freedom. Krause was emotionally disturbed and upset, and was informed by Hemmy to get counsel elsewhere for he could not and would not do anything about the matter. A notation to these very facts was made at the time in the original file of Mr. Hemmy which he retained in his office. This notation was marked Exhibit 3. Hemmy's notation in the file made at the time read as follows (R. 79):

> "Krause said he never took money from Sawyer and never did anything for him but that if necessary for freedom he would say he got the money. Sick wife—got to get out—disturbed. Signed or sworn to something that he never received money. Go to McCauley and tell him that he would testify—if all other charges were not pressed or were dropped. Sawyer could afford to go to jail. Always got discount on cars."

While Krause wrote Hemmy another letter asking him to come to the prison in connection with his parole matter, Hemmy never did, never replied to the letter and never agreed to become Krause's lawyer because he refused to act as Krause's lawyer in such an illegal arrangement (R. 74-85).

To show the real significance of the testimony of Knoll and Hemmy adduced for the first time at the

hearing on the petition for the writ of habeas corpus, specific testimony touching on the perjurous character of Krause's testimony was re-introduced to the District Court, being the testimony of the witnesses, Peter Daniel (R. 86), Harold Nall (R. 88), Frank P. Ziedler (R. 98), Ira Bertlow (R. 103) and Arthur Lehman (R. 107). The testimony of these witnesses showed that Krause had made numerous statements in the hearing of these witnesses to the following effect:—that he was not going to take the sentence by himself (R. 86); that he did not get anything from the man in Milwaukee or by the way of money on the auto deal; that he had someone coming to see him to straighten out some other kind of doings (R. 87); that he had made statements that he had got his affairs "all fixed" and he didn't expect to be in jail long (R. 87); that the reason Krause was testifying against Sawyer was because he was promised that two of his charges would be dropped (R. 89); that in answering questions of inmates as to how much he got or what else he got from the automobile dealer in Milwaukee, Krause responded that "he received nothing", and, after his return from Milwaukee in April 1952, in conversations with other inmates, he said he "was well pleased with the deal he got there" (R. 104); that he felt he owed his wife considerable consideration and must do something to get out of jail to assist her (R. 104). In talking about parole during the week after his return to Milwaukee in April, Krause said "it was necessary to change his story to have the outstanding detainer dropped so he would be eligible for parole even though he never received anything from Sawyer" (R. 105-107); that while Krause was talking to other inmates he said that he never received a car or any money from Sawyer but shortly after his

return from Milwaukee in April 1952, said "he had made a fairly good deal while there"; (R. 108), and this was at the time he had an application for parole pending (R. 108).

This testimony, when read and re-evaluated in the light of the testimony of Knoll and Hemmy clearly shows that Krause made a deal with the prosecution when he came to Milwaukee in April 1952, and, in pursuance of this deal, the prosecution procured, or, we might even say, purchased the changed and perjured testimony of Krause to use against Sawyer.

The District Attorney was called to testify on behalf of the respondent at the hearing in the District Court, and on direct examination, testified that the prosecution did not at any time in those years from 1951 to date ever write any letters concerning parole for Krause and "never interceded on behalf of Krause to a court or to the parole board". When the special prosecutor was called to the stand in the District Court, he, likewise, endeavored to mislead the court, and became very evasive about what arrangements he had made to have Krause change his testimony, and testified that he did not even know what the witness would testify to until he actually testified from the witness stand (R. 158). However, the special prosecutor admitted that he made no effort whatever to test the truth of the change in the testimony of Krause and that he did not at any time even ask Krause to plead guilty to the charge involving Sawyer. The special prosecutor testified he took the statement as true even though Krause never offered to plead guilty. On further examination, however, the special prosecutor admitted that just

before the case was set for trial, the offer of Krause to turn state's evidence was accepted by him and Krause thereupon became entitled to immunity. To effectuate this, the prosecution went through the formality of having the witness compelled to testify in order that he might obtain immunity in the Sawyer case, and, in accordance with this procedure, Krause was granted immunity in exchange for his testimony against Sawyer (R. 159). In support of his position that no understanding was arrived at with Krause to procure his testimony, the special prosecutor stated that Krause's offer to turn state's evidence was accepted without any threats or promises (R. 159). However, when confronted with the transcript of the proceedings held on June 2, 1952, the prosecution was forced to admit, on cross examination, that the prosecutor and his staff had interceded with the court and filed a formal motion that the remaining counts of an indictment against Krause for bribery (unrelated to the Sawyer case) be nolle prossed because Krause testified on behalf of the State in the Sawyer case (R. 180). The prosecution also admitted that it recommended to the court that the court take no action which would cause the parole board to deny Krause's parole. This recommendation to the court embodied a strong plea that in view of the testimony given by Krause in the Sawyer case the court should impose no further sentence upon Krause on a second count in the criminal case upon which Krause had been previously convicted and was to plead guilty. The court questioned its power to suspend the imposition of sentence, for it was not contemplated under the probation statute. (R. 179-188). Nevertheless on the strength of the prosecution's plea the court suspended the imposition of

sentence, a most unusual procedure and one unauthorized by Wisconsin law (*Drewniak* v. *State*, 239 Wis. 475, 1 N. W. 2nd 899).

In August 1952 Krause was granted parole and in addition, special permission was given to him to leave the State of Wisconsin while under parole and go to California. Thus, it is obvious payment of the price demanded by Krause for changing his testimony was made by the prosecution.

The District Court made the following findings of fact which we will summarize:

Krause steadfastly denied, until 10 days before the first Sawyer trial, that he had ever received any money from Sawyer or that Sawyer had ever requested him to use his influence. Krause executed an affidavit to this effect on April 21, 1951. While Krause was in prison, he told people there that he never received any money from Sawyer. Prior to the first Sawyer trial, Krause was brought to Milwaukee, and, on April 7, 1952, conferred with the prosecution. On his return to prison, he stated that he had made a good deal and was well pleased with the deal he got in Milwaukee. Then, the District Court specifically found that an understanding was reached between Krause and the prosecution because on the opening day of the first trial, the state presented a previously prepared motion to nolle counts one and two of the Sawyer indictment, which the trial court granted. The statutory formula for obtaining immunity for Krause was meticulously followed by the prosecution, and, on June 2, 1952, the state nollied the remaining 3 bribery counts in the indictment in case E-588, and, by a somewhat unusual procedure, procured the judge to suspend the *imposi-*

tion of sentence which enabled Krause to obtain parole. The District Court further found as a result of these activities, a parole was granted to Krause, who, with permission of the state authorities, moved to California. (R. 50-51).

The District Court also specifically found Krause was a perjurer, (R. 51), but failed to find whether the perjury occurred when Krause first gave his affidavit clearing Sawyer or occurred when Krause testified at the trials. (R. 53). The reason the District Court did not make this finding was because the court was of the *erroneous* opinion that the very vital testimony coming from Hemmy, the attorney whom Krause sought for aid, was privileged and hearsay, and therefore, could not be considered on the issue of perjury and that the corroborating testimony of Knoll likewise was hearsay. Because the District Court did not consider the testimony adduced by Hemmy and Knoll, that court held that the newly discovered testimony of Knoll *alone* being hearsay would not in itself be a basis for granting the writ. (R. 54). That court further found, notwithstanding the improper deal and arrangement which had been made between the prosecution and Krause, that the writ should not be granted because the conviction of petitioner by the state was not obtained by the *"knowing use"* of perjured testimony. (R. 54). Further, the District Court refused to find that the delay in trial deprived Sawyer of any constitutional right because the remedy of a person charged with a crime where a speedy trial is not afforded him in the trial court is to appeal to the proper appellate court for a writ of mandamus to compel trial (R. 29). From this premise and also on the theory that Sawyer's efforts to obtain a trial did

not amount to a sufficient demand for a speedy trial, the District Court refused to relate this delay of the trial to the agreement reached by the prosecution with Krause to change his testimony in exchange for his freedom. The District Court failed to find any facts concerning the numerous demands made by counsel for Sawyer for a speedy trial. Charles Geisenfeld, counsel for Mr. Sawyer, testified at length to his numerous efforts, and that of other counsel for Mr. Sawyer, to obtain a speedy trial. Mr. Geisenfeld testified that on every call of the calendar, Sawyer announced ready for trial, whereas the prosecution announced not ready for trial, asked for adjournment and obtained it. In addition, after this adjournment and prior to it, Mr. Geisenfeld testified that he addressed numerous demands to the calendar clerk of the Municipal Court, seeking the setting of the case for trial and made numerous personal demands on the prosecution's staff, including specifically the special prosecutor in charge of the Sawyer case. Mr. Geisenfeld testified that in each instance he was informed by the prosecution that there was no need to bring the Sawyer case on for trial *because it was going to be dismissed.* (R. 133-144). Other counsel for Mr. Sawyer furnished evidence to the same effect. Attorney Vouderuil testified that on May 1, 1951, which was after all of the preliminary motions, changes of venue and what not had long since been disposed of, and the petitioner was arraigned and pleaded not guilty, he then announced that petitioner was ready for trial—whereas, on the other hand, the special prosecutor stated that the prosecution was not ready for trial. Both Mr. Geisenfeld and Mr. Vouderuil testified below that they had never asked for a continuance of the Sawyer case at any time. The prosecution heretofore

has stated in briefs and arguments to the Supreme Court of Wisconsin and to this Honorable Court that an agreement had been arrived at under which the Sawyer case was to be continued until after the Krause case had been decided on appeal. While these contentions were made in arguments and in briefs, no member of the prosecutor's staff testified at the hearings below to the existence of any such agreement. On the contrary, Mr. Geisenfeld and Mr. Vouderuil testified emphatically to the contrary that there was no such agreement to delay the Sawyer trial, and they at no time ever asked for a continuance of the Sawyer trial. Both the district attorney and the special prosecutor were actually present at the hearing and in a position to contradict this testimony of Mr. Geisenfeld and Mr. Vouderuil had it not been true. Neither saw fit to do so. Hence, the testimony in this regard is uncontradicted. Notwithstanding this uncontradicted testimony, the District Court failed to make any findings of fact in regard thereto and the findings which the District Court made about the delay being acquiesced to or caused by Sawyer are wholly unsupported by any evidence.

The District Court on February 18, 1955, entered an order dismissing the petition for the writ of habeas corpus and remanding the petitioner to the custody of respondent (R. 55-56), but entered a certificate of probable cause to permit petitioner to remain on bail (App. p. 62).

An appeal was taken by petitioner from this judgment (R. 56). The Court of Appeals entered its decision on January 12, 1956 (App. p. 48). The Court of Appeals found that before the first Sawyer trial Krause wrote a letter to Hemmy. As a result of this letter, Hemmy visited Krause, who told him that he had not

received money from Sawyer and that Sawyer had never told him to use influence. The court further found that Krause said that if Hemmy would get the prosecutor to dismiss the remaining charges against him, he would testify that he accepted a bribe from Sawyer. The Court of Appeals further found that Hemmy refused to have anything to do with the plan but that he did make a note inside of the file cover. While the District Court heard and examined this evidence provisionally, it ruled that it was inadmissible as hearsay and as a privileged communication between a client and his attorney and struck it from the record (App. p. 49-51), the Court of Appeals properly held that the action of the District Court, in refusing to consider this testimony was error, the reasons being that the evidence was not hearsay and the attorney-client privilege never has prevented the disclosure of communications made in furtherance of crime. The Court of Appeals further held that there can be no doubt that Krause's communication was, on its face, fraudulent and an attempt to have the lawyer assist him in the commission of a crime because, while Krause said he did not receive any money from Sawyer, he, nevertheless would testify that he did if Hemmy could make a deal with the prosecutor to have the remaining charges against him dismissed (App. p. 50-52).

The Court of Appeals further ruled that Hemmy's testimony was not hearsay (App. p. 52), and was admissible "to show perjury by the witness, Krause, in both trials" (App. p. 52, 53). Notwithstanding that the Court of Appeals admitted that Hemmy's testimony tended to show perjury at both trials, it ruled that it fell short of establishing that the prosecutor *knowingly*

used that perjured testimony in those trials (App. p. 53, 54). Instead of remanding the case to the trial court, for findings based upon the admissibility of the Hemmy testimony, the Court of Appeals erroneously held that because the prosecutor was not shown to have *known* Krause's testimony to be false, the error was not prejudicial and affirmed the action of the trial court in dismissing the writ.

In dealing with the testimony of the Witness Knoll, the Court of Appeals held that the same reasoning which it had applied to Hemmy's testimony should be applied. As we read this, this is a reversal by the Court of Appeals of the District Court's view that Knoll's testimony was hearsay (R. 42), and, therefore, should have been received on the basic issue of perjury and the existence of an unlawful arrangement between the prosecution and Krause, calling for the use of perjured testimony to convict Sawyer. While the Court of Appeals apparently has ruled that the testimony of Knoll is not hearsay and is admissible as tending to prove perjury at the trials and is evidence of a scheme which, on its face, was fraudulent and involved the commission of a crime, it ruled this testimony failed to establish that the prosecutor *knew* that the testimony of Krause was perjured. Accordingly, the Court of Appeals ruled that the erroneous rejection of Knoll's testimony as hearsay by the District Court was not prejudicial to Sawyer because it did not establish by *itself* a denial of due process to petitioner. (App. p. 56).

The very basis of the Court of Appeals' opinion is that no matter what the evidence is establishing the use of perjured testimony in a state court trial and no matter what inducements the prosecution held out to a felon to induce him to perjure himself, unless a per-

son convicted by that perjured testimony can show that the prosecutor *knew* the testimony to be perjured when used, no relief can be afforded to the unjustly convicted citizen (App. p. 56). Intertwined in this question of perjured testimony is the delay of the trial until April of 1952 when Krause finally became available as a witness after the prosecution accepted his agreement, now characterized by the Court of Appeals as fraudulent and criminal, to testify against petitioner in exchange for his freedom. Petitioner timely filed a petition for rehearing, pointing out to the Court of Appeals the obvious errors of fact and law contained in its decision and seeking their correction. The Court of Appeals denied this petition for rehearing on the March 1, 1956, leaving to petitioner recourse only to this Court for the protection of his constitutional rights to a speedy and fair trial conducted in accordance with due process of law as defined by the decisions of this Honorable Court. In this posture of the case certiorari is warranted. *Leyra* v. *Denno*, 347 U.S. 556.

REASONS FOR GRANTING THE WRIT

Several compelling reasons for the allowance of a writ of certiorari are present in this case. The court below has rendered a decision in conflict with the applicable decisions of this Court, has rendered a decision in conflict with decisions of other Circuit Courts of Appeal, has decided important questions of law contrary to decisions of this Court, and has decided important questions of federal law contrary to the decisions of this Court, and decisions of other Courts which deprive petitioner of due process of law and the questions presented are of such importance in the administration of criminal justice that the public inter-

est calls for the exercise of this Court's powers of supervision and correction. *Screws* v. *U. S.*, 325 U.S. 91, 94; *Williams* v. *U. S.*, 341 U.S. 97; and see *Leyra* v. *Denno*, 347 U.S. 556.

I.

The Court of Appeals Has Rendered an Erroneous Decision on an Important Question Which Deprives Petitioner of Due Process of Law, Which Conflicts With Decisions of the Supreme Court of the United States, Other Circuit Courts of Appeal and of the Highest Courts of Some of Our States and With Other Applicable Decisions

The deal entered into by the prosecution with the principal witness, Krause, under which the prosecution obtained a change in the testimony of this witness and used that changed and, we say perjured testimony, to convict Sawyer, in exchange for the witness not only obtaining immunity on two separate counts in the Sawyer indictment, but also involving a dismissal of three other criminal charges by the prosecution against the witness, and the improper handling of another criminal charge to prevent and suspend the imposition of sentence even after a plea of guilty was taken, all in such a way as to assure the prosecuting witness parole and his freedom and the right to leave the State of Wisconsin and go to California, renders the use of perjured testimony in the trials against Sawyer improper and its use deprived petitioner of a fair trial, contrary to the due process provisions of the 14th Amendment.

As we have shown in the Statement of the case, vital and important new evidence was adduced at the hearing in the District Court, establishing that the changed testimony of Krause, which had been procured under a deal made by the prosecution with Krause about a

week before Sawyer's first trial and used against Sawyer, was perjured. The witness, Knoll, who had talked to Krause while he was in prison upon numerous occasions and for hours at a time, testified that Krause had told him that he had to get out of prison, his wife was "wild—was crazy" and that he, Krause, would do anything to get out of prison and had made an arrangement to get rid of the criminal charges which had been held over his head by the prosecution, whereby he would testify falsely that he was in fact bribed by Sawyer. Krause, stated that he was going to perjure himself and defended his right to do this on the ground that he had to get out of prison, and this is the reason he made a deal with the prosecution to make this perjured testimony if they would drop all of the remaining criminal charges against him so that he could make parole. According to his plan to use perjured testimony against Sawyer and prior to entering into the mentioned arrangement with the prosecution, Krause induced Knoll, to refer him to Mr. Hemmy, Knoll's attorney. Krause wrote Hemmy, had Hemmy come to the prison and there revealed to Hemmy his corrupt and criminal scheme to testify falsely against Sawyer when he had in fact not been bribed by Sawyer; and suggested that Hemmy make this corrupt proposal to the prosecution in exchange for the dismissal of all criminal charges against him so that he could make parole. Hemmy made a notation of this criminal scheme in his file at the time he heard it from Krause, and Hemmy identified the correspondence he had received from Krause in the matter. This vital testimony of Knoll and Hemmy, establishes (1) that Krause was going to commit perjury against Sawyer in the Sawyer trial; and (2) the existence of a fraud-

ulent and criminal scheme or understanding between the prosecution and Krause whereby Krause was to testify falsely against Sawyer in exchange for the dismissing or favorably disposing of all other charges against Krause and the obtaining of parole for Krause.

The District Court received the testimony of Knoll and Hemmy provisionally and subject to the objections that all this testimony was hearsay and the specific objection that the communications from Krause to Hemmy were privileged because Hemmy was an attorney. The District Court ultimately sustained the objections to the Knoll and Hemmy testimony, struck it from the record and refused to consider it in dealing with the questions of perjury and a criminal and unlawful arrangement between the prosecution and Krause, but the District Court was emphatic in finding that, (1) Krause was a perjurer; and (2) an understanding had been reached between Krause and the prosecution under which Krause was to change his testimony and testify against Sawyer in exchange for the dismissal or other favorable handling of numerous criminal charges against Krause in order that he may gain parole and obtain his freedom and the right to leave Wisconsin (R. 36-37, 50-52).

Accordingly, the findings of fact, conclusions of law and denial of the writ by the District Court were made *without* consideration of the vital testimony of Knoll and attorney Hemmy which was erroneously excluded because of hearsay and privilege (R. 42, 50-52, 55).

On appeal, the Court of Appeals ruled that the testimony of Knoll and Hemmy was substantive evidence, was not hearsay, and was admissible to prove both perjury and the arrangement made with the prosecution

(App. pp. 52-54). Having ruled that the rejection by the District Court of the Knoll and Hemmy testimony was error the Court further ruled that it was harmless error because even though that testimony tended "to show perjury by the witness, Krause, in both trials in the state court", (App. p. 53), neither Hemmy's nor Knoll's testimony established that the prosecutor *knew* of the perjured nature of the testimony. The Court of Appeals even went so far as to say (App. p. 56), that the testimony did not show that the prosecutor *should have known* that Krause's testimony was false. And, ignoring the implied arrangements from the delay of the trial until the prosecution had obtained what we now know was perjured testimony to use against Sawyer in exchange for Krause's freedom, which was the price Krause demanded before so testifying falsely, the court, nevertheless, ruled, because there was a failure to show *actual knowledge* by the prosecutor in the use of this perjured testimony under all the facts and circumstances adduced at the hearing below, that the exclusion of the Hemmy and Knoll testimony was not prejudicial error, and, therefore, the judgment of the District Court should be affirmed.

We do not believe that this court is prepared to say that convicted persons whose convictions are based upon perjured testimony later discovered to be so, nevertheless, may be executed in murder cases or jailed in other criminal cases because of the inability of the accused to force a prosecutor to admit that the prosecutor knew that the testimony was perjured at the time it was introduced. The basic question involved is whether or not the accused is being deprived of his life or liberty by a fair trial. We say no honest thinking person would contend that a conviction ob-

tained by perjured testimony, whether the perjury was known to the prosecutor at the time or not, was obtained by due process of law and a fair trial. The use of perjured testimony alone, knowingly or unknowingly, deprives the accused of a fair trail. It is not due process of law to execute or jail persons on perjured testimony. We contend for a much broader and humane rule than that announced by the District Court and the Court of Appeals below that convictions obtained by perjury cannot be set aside unless it is shown that the prosecutor knew of the perjury at the time.[1]

We feel that the decision of the Sixth Circuit Court of Appeals, in *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 234, states the more humane reasoning in this regard. The *Jones* case holds just the opposite to the decision below and points out that the basic reasons why it is not necessary to establish knowing use of perjured testimony in the granting of a writ of habeas corpus to protect against perjury. In the *Jones* case, the petitioner had been indicted and convicted of murder. Newly discovered evidence was later offered to the state courts, tending to establish that the principal witness for the prosecution committed perjury and that this perjury was responsible for the conviction. The Kentucky trial court denied the writ and was affirmed on appeal by the highest court of Kentucky. The writ was sought in the federal court and denied. An appeal from that denial was taken to the Sixth Circuit. The District Court denied the writ because it was not established that the perjury was known to the

[1] "A verdict or judgment based on perjured testimony not only is unfair but is a fraud on the Court and should be set aside at any time upon proof of the perjury." Dausuel v. Dausuel, 90 U.S. App. D.C. 275, 276, 195 F. 2d 774.

prosecution at the time of the trial. In an unanimous opinion, the Sixth Circuit reviewed the problem posed by the use of perjured testimony and held (p. 338) that constitutional safeguards cannot be maintained nor respect for the judicial process promoted by convictions secured on perjured testimony. Accordingly, the Court of Appeals reviewed the new evidence offered and held that it was credible and from it there was reason to believe that the conviction assailed was procured by perjury. It further pointed out that the infirmity in the testimony was not disclosed to the attorney general of the state and was not known to him until after the conviction. Thus, there was presented to the Court of Appeals the question of whether to permit a judgment of conviction to stand where newly discovered evidence tended to show that it was obtained by perjury which perjury was not known to the state at the time of the trial.

In reversing the District Court's order in the *Jones* case dismissing the writ and in remanding the case to the District Court with instructions to discharge the accused from custody, (we quote the decision at length, because we submit it is a complete answer to the arguments of the Court of Appeals below and of the District Court concerning *knowing use* of perjured testimony) the Court of Appeals held (p. 338):

> "The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in Mooney v. Holohan, 294 U.S. 103, 112 55 S. Ct. 340, 341, 342, 79 L. Ed. 791, 98 A. L. R. 406. Its requirement in safe-guarding the liberty of the citizen against deprivation through the action of the state embodies those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' referred to in Hebert v. Louisiana,

272 U.S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102. This requirement cannot be satisfied 'By mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court, and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney Case embraces no more than the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.

"The judicial processes of the state have here been vainly invoked. The court below stayed its hand until they had been given full opportunity to function. Even then it was thought wiser to have the clearly indicated relief sanctioned by a three judge reviewing court than to have responsibility for setting aside a state court judgment assumed by a single judge of an inferior Federal court. Considerations of delicacy and propriety need no longer deter amelioration."

We agree with what the Court of Appeals for the Sixth Circuit said in discussing *Mooney* v. *Holohan*,

294 U.S. 103. In that case, there was involved a knowing use of perjured testimony by the prosecution. Accordingly, this Court ruled that such knowing use of perjured testimony was a violation of the due process requirements of the 14th Amendment; and the decision of this Court in that case should not be stretched to mean that citizens are to be executed or imprisoned on convictions based on perjury. The 14th Amendment protects the citizen against any state proceeding which deprives him of his liberty without "due process of law". This Court has made it clear that coerced testimany, if used against an accused, can deprive him of a fair trial and that due process of law in criminal cases guaranteed him by the 14th Amendment. In *Lesenba* v. *California,* 314 U.S. 219, this Court held, (p. 236):

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

Accordingly, it certainly follows that the use of induced false testimony against an accused is fundamentally unfair.

While petitioner was unable to establish actual knowledge by the prosecution that the testimony of Krause was known by the prosecution to be perjured at the time of the trials, nevertheless, we submit that the conduct of the prosecution's staff in procuring and using this perjured testimony of Krause rendered the trial unfair and violated this Court's definitions of due process. Thus, from the testimony of Hemmy, we find a corrupt proposal from Krause to testify falsely against Sawyer in exchange for the dismissal or the favorable handling of the outstanding criminal

charges against Krause in order that Krause might obtain parole and his freedom at the earliest possible time. This corrupt nature of this proposal to Hemmy was corroborated by Knoll, who testified that Krause told him that he was going to testify falsely against Sawyer in order to obtain his freedom. Krause never attempted to justify the perjury that he was going to commit against Sawyer on any theory of truth, and the District Court made findings that these conversations actually occurred as testified to by Hemmy and Knoll and that an understanding was reached between Krause and the prosecution for the nolleing of five charges of bribery against Krause and the suspending of the imposition of sentence, an unusual procedure not known to Wisconsin law, in order that Krause might make parole and leave the state. (R. 50-51). All of this was the price Krause demanded of the prosecution to testify against Sawyer. The prosecution met that price and at the first and second trials, suppressed this arrangement in the state trials and attempted at the hearing before the District Court, to suppress this arrangement which they had with Krause and to suppress the actions the prosecutors took before a judge of the Municipal Court to be sure that no action would be taken by that court in the nolleing and disposal of the five criminal charges against Krause that would impair Krause's obtaining parole and his freedom. Yet, we now know and the District Court has found that such an understanding was reached not later than April 7, 1952 between Krause and the prosecution about one week before the first trial of petitioner. The very suppression of this evidence, even if we forget that it induced and secured perjury, deprived Sawyer of a fair trial. *Remington*

v. *U. S.*, 343 U.S. 907, wherein Mr. Justice Black, with Mr. Justice Douglas stated:

> "The second challenge is: 'The United States Attorney deliberately withheld information concerning the collaboration of Bentley and Brimini from defendant's counsel and then sought to suppress the evidence when it became known to defendant's counsel from other sources. . . . The government conduct here charged is abhorrent to a fair administration of justice. It approaches the type of practice unanimously condemned by this court as a violation of due process of law in *Mooney* v. *Holohan*, 294 U.S. 103.'"

To the same effect is *Woolomes* v. *Heinze* (9th Cir.) 198 F. (2d) 577, wherein the court stated:

> "Deliberate suppression of evidence may well constitute ground for release where there has been connivance or actual fraud by the prosecution preventing use of evidence by the accused at his trial. *Pyle* v. *Kausos*. . . . *Mooney* v. *Holohan* . . ."

And see *U. S., ex rel, Almeida* v. *Baldi*, (3rd Cir.) (1952), 195 F. (2d) 820, wherein the Court of Appeals sustained the issuance of a writ of habeas corpus on the ground that evidence tending to show that the defendant did not fire the fatal shot was suppressed by the commonwealth, with the court holding that the suppression of evidence of this character deprived the accused of due process of law. The reason why the suppression of evidence deprives the accused of a fair trial is because under our conception of justice, due process requires the prosecution to introduce all evidence whether it favors the accused or not. *U. S.* v. *Ragen*, 86 F. Supp. 382, 387.

When we consider that under this suppressed understanding, perjury was induced, procured and used by the prosecution, we submit there would be no distinction had the prosecution actually purchased and paid money for the perjured testimony or coerced it. The reason being that the consideration given Krause by the prosecution, that is, the satisfactory disposition of six felony charges against him, the obtaining of parole for him, the obtaining of his freedom to leave the state after serving the least possible time, was worth more to Krause than money. Yet, would anyone hesitate to say that if it could be shown that the prosecution purchased and paid money to get a witness to change his testimony and that fact was discovered that a reviewing court would not hold that the use of "purchased testimony" deprived the accused of a fair and impartial trial? Common principles of decency compel against the use of testimony that is coerced, induced for consideration in money or other favors to the witness, or procured by fraud. And, when such facts are shown, this Court has consistently held that such practices render the trial unfair and deprive the accused of due process. *Lee* v. *Mississippi*, 332 U.S. 742; *Chambers* v. *Florida*, 309 U.S. 227; *Stein* v. *N. Y.*, 346 U.S. 401.

We respectfully submit that the deal and understanding entered into between Krause and the prosecution under which the false testimony of Krause was obtained with promises of a parole and immunity, as we have outlined, is indistinguishable, as the Supreme Court of Wisconsin pointed out years ago, from a direct sale of justice and is abhorrent to the fair administration of justice. Thus, in *White* v. *Rindskopf*, 43 Wis. 350, Chief Justice Ryan held:

"... A public prosecutor may propose to an accomplice to become a witness for the prosecution; but an agreement to use him as a witness, upon any condition, without the sanction of the court, is an usurpation of authority, an abuse of official character and a fraud upon the court. ..."

"... Any agreement of a public prosecutor with an accomplice becoming a witness, for any advantage to the accomplice beyond his immunity upon the indictment upon which he testifies. ... would not only be beyond the official authority of a public prosecutor but would be an obstruction of public justice which no court could sanction or countenance. ... we know of no practice, of no case in the books to sanction or countenance any suggestion of the public prosecutor for immunity or clemency to the defendant on one indictment, on condition of his giving evidence for the prosecution on others. ..."

"... A public prosecutor making it would be unworthy of his office and of his profession ..."

"Any agreement of the character here in question, unsanctioned by the court in which the indictments are pending, between a public prosecutor and the attorney of the defendant, in an indictment, is an assumption of judicial function, a bargain for judicial action and judgment; hardly, if at all, distinguishable in principle from direct sale of justice."

As the uncontradicted evidence now discloses the existence of a suppressed understanding between Krause and the prosecution and clearly tends to establish that under that agreement Krause perjured himself when he testified against Sawyer in both trials, this court should grant certiorari to insure the proper administration of criminal justice in accordance with

the principles of due process as defined by this court in the public interest.

II.

The Obvious Unreasonable Delay in Bringing Petitioner to Trial, Over His Objection, Resulting to His Prejudice, in the Use of Perjured Testimony to Obtain a Conviction Deprived Petitioner of a Speedy Trial and His Liberty Without Due Process of Law. The Question of Whether Convictions, Obtained by Denials of Constitutional Guarantees, Should be Permitted to Stand Is of Such Great Importance to the Administration of Criminal Justice That Certiorari Is Warranted and Should be Granted to Resolve the Question in the Public Interest

As was discussed in the statement of the case, the petitioner was indicted on April 25, 1950 and not brought to trial until April 15, 1952. Nine terms of court elapsed between the indictment and the trial. In the period between the indictment and the first trial of petitioner, petitioner on several occasions filed motions to dismiss the indictment because of unreasonable delay in bringing him to a speedy and public trial contrary to the provisions of the constitutions of Wisconsin and the United States. These motions were denied in spite of the failure of the prosecution to present any valid grounds in opposition thereto. Petitioner likewise, in open court, filed a printed form which waived trial by jury and consented to an immediate trial before the Court. The prosecution objected and the Court sustained the objection. Demands were made by counsel for petitioner to the Calendar Clerk of the Court, to the District Attorney and to the Special Prosecutor for a trial. Nevertheless, the case was delayed and not called for trial until about a week after the prosecuting witness, Krause, had conferred with the District Attorney and made arrange-

ments with him to accept his changed and perjured testimony in return for granting Krause immunity and dismissing other indictments pending against him. The prosecuting attorney never gave sufficient reason for the prolonged delay in bringing petitioner to trial. The record is clear and the testimony of Attorney Geisenfeld shows that there never was an agreement with the prosecuting attorney to delay the trial of petitioner until the Supreme Court of the State of Wisconsin had decided questions pertaining to the impanelling of the Grand Jury which indicted petitioner and Krause in the case which was pending in that Court on Appeal by Krause.

The statement of the prosecution filed in its brief to the Supreme Court of Wisconsin, that "the state has at all times been willing and ready to proceed to trial" is not borne out by the record. Although the Supreme Court of Wisconsin in considering the matter of speedy trial on the first appeal held that, while there was merit to petitioners contention that the delay deprived him of his constitutional rights requiring a speedy trial, the Court stated he was not entitled to dismissal of the indictment because of the violation of his constitutional rights because he never took affirmative action to obtain such a trial (263 Wis. 218, 224).

While we now know that there was merit to petitioner's contention that his trial was delayed, we also now know that the Supreme Court of Wisconsin's factual statement that Sawyer never sought a trial of his case is completely unsupported by evidence and the undisputed evidence now shows the opposite to be true. We contend that the reasoning of the Supreme Court in the second Sawyer appeal (*State* v. *Sawyer*, 266 Wis. 494; 63 N.W. (2d) 749), that the decision on the

first appeal renders the question of a speedy trial res adjudicata, is erroneous. Erroneous decisions of state courts based on perjured testimony and false facts not adduced in the testimony have never yet been considered by this Court to be a bar to this Court's testing the validity of such proceedings to ascertain whether or not accused citizens were convicted and jailed contrary to the provisions of due process of law as defined by this Court.

While the Court of Appeals, in discussing the right of petitioner to a speedy trial, admits that if it can be shown that the lack of a speedy trial results in the taking of a prisoner's liberty, that is, a denial of due process, we find that Court accepting the erroneous position taken by the Supreme Court of Wisconsin that Sawyer not only failed to ask for a trial, but that this amounted to acquiescence in delay and, therefore, was a waiver of the right to speedy trial (App. p. 6-4). Yet, the record and the testimony adduced for the District Court establishes just the contrary (R. 15-17, 133-145). The Court of Appeals erroneously assumed that the cause of delay in bringing petitioner to trial was the prosecutions desire to wait until the Supreme Court of Wisconsin had determined the Krause appeal which embodied similar questions of law as were raised by petitioner. The very apparent reason for this delay was the prosecutors inability to muster the evidence required to obtain a conviction. The evidence required to obtain the conviction of petitioner was not acquired until Krause turned state's evidence and agreed to give perjured testimony in exchange for his freedom. The state arranged its deal on or about April 7, 1952, with Krause. A week later the prosecution was ready for trial for the first time! Pursuant to the

understanding then reached between Krause and the prosecution, Krause changed, and, we say, falsely, his testimony from steadfast denials that he had received money from Sawyer or that Sawyer had requested him to use his influence to just the opposite. In exchange for which two counts in the Krause indictment were immediately nollied and after the conviction of Sawyer the prosecution nollied three remaining unrelated bribery charges against Krause and handled the 4th bribery charge against Krause in a very unusual procedure contrary to state court practice, whereby a judge was importuned to suspend the imposition of the sentence in that case in order that Krause might obtain parole, which he did, and, with the prosecution's permission, moved to California.

This change in testimony should be considered in connection with the delay of the trial from June 5, 1951 at the prosecution's request, and, when so considered it is obvious that the delay, granted over the demands of Sawyer for trial, was unreasonable, was done without Sawyer's consent, and afforded the prosecution the opportunity to effectuate an agreement with Krause, which agreement the Court of Appeals below characterized as fraudulent and criminal (App. p.52). The right to a speedy trial is not dependent upon whether or not an accused is in jail or out on bail. The constitutional guarantee contained in the Constitution of Wisconsin and in the Federal Constitution for a speedy trial, which, we say, since early times have been a part of due process of law, is self-executing.

We submit that this Honorable Court, when it affirmed without opinion, (76 Sup. Ct. 101) the case of *Petition of Provoo,* 17 F.R.D. 183, upheld the basic rulings of Judge Thomsen on the constitutional ques-

tions involved in the *Provoo* case. We submit that it is now the law, as held by Judge Thomsen in the *Provoo* case, that "the right to a speedy trial is of long standing and has been jealously guarded over the centuries". As Judge Thomsen pointed out, "the Magna Charta provided to no one will we sell, to no one delay, right or justice." The Magna Charta was implemented by special writs of jail delivery under which the jails of England were cleared. Parliament passed the habeas corpus act which protected the right of indicted prisoners to an early trial, and, where there was a delay in trying an accused, the habeas corpus act provided for the discharge or acquittal of the accused. These principles were cherished by the British people who settled the colonies. Many thought that the right of speedy trial was so clearly a part of our liberty that no Bill of Rights was necessary to protect it. (The Federalist, No. 84), but, to be sure that this right was protected, the American people added the 6th Amendment to the Federal Constitution, guaranteeing the accused a speedy trial. Congress did not pass any statute defining the term "speedy trial". The right also has been incorporated in the state constitutions, and is included in the Constitution of the State of Wisconsin.

We submit that a speedy trial is a part of due process of law and is guaranteed every accused in state trials because of the provisions of the 14th Amendment. As the Provoo case pointed out, Cooley, (Constitutional Limitations, 8th Edition, 1927, Vol. 1, p. 645, et sec.); (17 F.R.D. 183, 198) states, "when a person charged with crime is ready to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper

preparation and to secure the attendance of witnesses." The *Provoo* case decided, that this was the rule which was applied in *U. S.* v. *Fox,* 3 Mont. 512, where an indictment was dismissed after two mis-trials because of the failure of the government to supply funds for a third trial at the next term of court. The *Provoo* case holds that defendants are not required to show prejudice in fact, and, where a delay is occasioned by the prosecution, the defendant is entitled to be discharged. (17 F.R.D. 183, 198) ... This rule has been applied in many state cases. *Dickoff* v. *Dewell,* 1942, 152 Fla. 240, 9 So. 2d 804; *People* v. *Molinari,* 1937, 23 Cal. App. 2d Supp. 761, 67 P. 2d 767; *Harris* v. *Municipal Court,* 1930, 209, Cal. 55, 285 P. 699; *Ex parte Miller,* 1919, 66 Colo. 261, 180 P. 749; *Von Feldstein* v. *State,* 1915, 17 Ariz. 245, 150 P. 235; *Yule* v. *State,* 1914, 16 Ariz. 134, 141 P. 570; *In re Begerow,* 1901, 133 Cal. 349, 65 P. 828; *State* v. *Phil,* 1827, 1 Stew., Ala., 31; *State* v. *Sims,* 1807, 1 Tenn. 253; *State* v. *Stalnaker,* 1806, 2 Brev., S. C., 44; *State* v. *Maurignos,* 1805, T.U.P. Charlt., Ga., 24.

Judge Thomsen held in the *Provoo* case that in 1944 the Supreme Court adopted Criminal Rule 48, which authorizes a court to dismiss an indictment if there is unreasonable delay in bringing the defendant to trial, but pointed out that this rule was but a restatement of the inherent power of a court to dismiss a case for want of prosecution. (*Ex parte Altman,* 34 F. Supp. 106) Accordingly, Judge Thomsen decided that the delay in the *Provoo* case was caused, as here, by the acts of the prosecution and that because counsel for Provoo announced ready for trial and moved to dismiss the indictment because he had been denied a speedy trial, that Provoo had not waived his right

to a speedy trial by not seeking mandamus in the Court of Appeals. (17 F.R.D. 200, 201). Judge Thomsen further held that prejudice is presumed from delay, and, further, that the delay had, in fact, prejudiced Provoo. He concluded Provoo accordingly could not obtain a fair trial because of the denial of his right to a speedy trial, and that further prosecutions would violate fundamental principles of justness and fairness. An order was therefore entered dismissing the indictment. The *Provoo* case cited with approval two decisions in the District of Columia, namely, *U. S.* v. *McWilliams,* 69 F. Supp. 812, and *U. S.* v. *McWilliams,* 163 F. 2d 695. In the *McWilliams* case, an indictment for sedition was brought in 1944 in the District of Columbia against a number of defendants. Several months later, the trial commenced but ended in a mis-trial as a result of the presiding judge's death before the end of the trial. Several of the defendants moved for a trial but without results. A new judge was assigned to the case early in 1946. He concluded it was his plain duty to dismiss the indictment, stating that the long delays which had been granted over the defendants' objections prevented them from obtaining a fair trial. Chief Judge Laws of the District Court further held that to permit the case, after two years, to go to trial would be "unjust and un-American" and a "travesty of justice" (163 F. 2d 696). On appeal, the United States Court of Appeals for the District of Columbia unanimously affirmed this action of Judge Laws, taking the position (163 F. 2d 697) that from January 1946 to the end of that year, when the case was dismissed, trial had been sought at the instance of some defendants with no result, and that, therefore, the decision at the trial of Judge Laws to

dismiss the indictment was "altogether reasonable and proper".

While it is true that the first ten amendments to the Constitution do not apply to a state, we submit that the denial of a speedy trial which results, as here, in depriving an accused of a fair trail because of prejudice resulting from delay, is an inherent part of due process of law and is protected by the provisions of the 14th Amendment. Accordingly, when a state, as here, delays a trial, and, during that period of delay, is able to persuade by an agreement, characterized by the court below as fraudulent and criminal, with a felon to change his testimony and testify falsely against an accused, that such conduct offends fundamental principles of justice and fairness, destroys the fairness of the trial, and that this court has power to protect such an accused under the due process provisions of the 14th Amendment from such a denial of fundamental justice.

The decision below clearly conflicts with the decision in the *Provoo* case which this court unanimously affirmed without opinion (76 Sup. Ct. 101), the decisions in the *McWilliams* cases and the numerous other decisions we have cited. The question involved in petitioners case is one of great importance to the administration of criminal justice, and, under the circumstances here involved, certiorari is warranted, should be granted, and the erroneous decision below resolved in the public interest.

III.

The Court of Appeals Ruling That the District Court Erroneously Excluded Vital Testimony Proving Perjury and the Substitution by the Court of Appeals of Its Findings and Conclusions for Those of the District Court, Who Heard the Witnesses But Excluded Their Testimony From Consideration, Without Remanding the Case to the District Court for a New Trial and Additional Findings and Conclusions After Reconsideration of the Excluded Testimony Constitutes a Denial of Procedural Due Process of Law to Petitioner

When the Court of Appeals reversed the District Court and ruled that the testimony of the witnesses, Knoll, and Hemmy, was substantive testimony, was admissible to prove both perjury and the existence of an agreement with the prosecution, and that the Hemmy testimony was not privileged, because the District Court had excluded this testimony in reaching its findings of fact and conclusions of law, the court below should have remanded the case to the District Court for new trial and for findings in the first instance upon this testimony and upon other important testimony not properly considered by the District Court.

As we have shown in the statement of the case, Hemmy and Knoll both testified that Krause wanted to enter into a fraudulent and criminal understanding with the prosecution under the terms of which he would testify falsely against Sawyer in exchange for immunity, the satisfactory disposition of six other criminal charges against him by nolleing, dismissal or otherwise, the granting of parole, and the granting to him of the opportunity to leave the state. This very vital testimony proving, (1) the fact that the testimony of Krause in both trials was perjured; and (2) that there was a fraudulent and criminal understanding in existence which had been suppressed by the prosecu-

tion, was stricken and not considered by the District Court on the theory that the evidence was hearsay in both instances as to both witnesses, and, further, that the Hemmy testimony, because Hemmy was an attorney, was privileged. As this testimony was stricken and not considered by the District Court, it could not be connected up in the findings of that court with the prosecution's delay of the Sawyer trial until after it had entered into an understanding or agreement to procure the testimony of Krause to use against Sawyer, which understanding did not occur until April of 1952.

The District Court made no findings concerning the numerous demands made by Sawyer's counsel for a trial, because it contended Sawyer should have sought mandamus to compel an early trial. But this cannot be properly evaluated without the court ruling and making a finding on the testimony of attorney Geisenfeld that the state was never ready for trial on any occasion when the case was called for trial whereas the petitioner was always ready, that numerous demands were made of both the calendar clerk and the prosecution for an early trial, but that the prosecution explained away this delay by telling Geinsenfeld not to hurry and there is no hurry in the matter because the prosecution was going to dismiss the Sawyer case anyhow.

We submit that findings have to be made concerning the testimony of Attorney Geisenfeld before proper evaluation could be made of the speedy trial issue involved in this case.

The Court of Appeals did not remand the case to the District Court with instructions to consider the

evidence of Knoll and Hemmy or to reconsider and to make additional findings concerning the evidence of attorney Geisenfeld, as requested by petitioner, on the theory that the exclusion of this vital evidence and lack of findings did not prejudice the petitioner. This ruling of the Court of Appeals is erroneous because the exclusion of the Hemmy and Knoll testimony and the failure to properly consider the Geisenfeld testimony deprived petitioner of a fair trial, the exclusion of the evidence was prejudicial error. It was reversible error because that evidence formed vital links in the chain of evidence necessary to the granting of the writ. This Court has held that where evidence, even if only proffered, is rejected and the evidence forms a link in the chain of proof in a case in a trial court, that the rejection of the evidence is prejudicial error, requiring a reversal and a new trial. *McCandless* v. *U. S.*, 298 U.S. 342.

We submit that where a different decision may have reasonably been made from evidence erroneously rejected by the District Court or from evidence not properly considered by that Court, that the proper procedure in order to provide due process of law to the petitioner is to remand the case to the District Court for a new trial and for appropriate findings after a reconsideration of the admissible and proper evidence. *Johnson* v. *Zerbst*, 304 U.S. 458; *Walker* v. *Johnston*, 312 U.S. 275; *Moore* v. *Dempsey*, 261 U.S. 86.

Accordingly, it is submitted that at the very least the court below should have remanded the case to the District Court for a new trial and additional findings of fact and conclusions of law, especially where the failure to consider the excluded testimony results in a miscarriage of justice in that the decision would have

been different if such evidence had been admitted. *Sparks* v. *U. S.*, 241 F. 777; *Crawford* v. *U. S.*, 212 U.S. 183; *Miller* v. *U. S.*, 120 F. 2d, 968, 973; *Little* v. *U. S.*, 73 F. 2d, 861, 866. The opinion below conflicts with the decisions of this court and with *U. S.* v. *Gamble-Skogmo*, 91 F. (2d) 372, and on this important question of procedural due process, certiorari should be granted, and this conflict resolved and determined by this court in the public interest.

We say that if the opinions below remain unmodified that the constitutional safeguards surrounding trials in state courts will not have been maintained and that the respect of the public for our judicial process will have been impaired. The use of perjured testimony, the manner in which that perjured testimony was induced and procured and the other prejudicial procedural errors described in this petition, destroyed the inherent fairness and all appearance of fairness in the trial of petitioner.

CONCLUSION

WHEREFORE, your Petitioner respectfully prays in this petition that this Honorable Court grant a writ of certiorari and bring before this court the decision and judgment of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11464 JANUARY SESSION, 1956—OCTOBER TERM, 1955.

In the Matter of the Petition for Writ of Habeas Corpus for WALTER J. SAWYER

WALTER J. SAWYER, *Petitioner-Appellant,*

v.

MAX A. BARCZAK, SHERIFF OF MILWAUKEE COUNTY, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Wisconsin

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January 12, 1956.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* This is an appeal from the trial court's denial of a petition for a writ of habeas corpus for release from state imprisonment.

The petitioner, Walter J. Sawyer, was an automobile dealer in the City of Milwaukee, Wisconsin. His garage was located on property to which the city had taken title in order to widen the street on which the garage faced. The project as originally proposed called for the destruction of the Sawyer garage. The plan was eventually changed so that the block in which Sawyer's garage is located was widened on one side only, thereby allowing the garage to remain standing. As a result the street is

narrower in that section of the block than elsewhere, and the streetcar tracks are eight feet off center.

Sawyer was charged with having bribed Albert Krause, a Milwaukee alderman, to use his influence in having the plan changed so that the Sawyer garage would not be destroyed. Sawyer was indicted under Section 346.06 of the Wisconsin Statutes; he was tried and convicted. This conviction was reversed and remanded by the Wisconsin Supreme Court because a copy of the prosecutor's notes used on oral argument was inadvertently included in the exhibits which were sent to the jury room *State* v. *Sawyer*, 263 Wis. 218, 56 N. W. 2d 811. On a second trial Sawyer was again found guilty, and this conviction was affirmed. *State* v. *Sawyer*, 266 Wis. 494, 63 N. W. 2d 749.

Sawyer then filed his petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin. In this petition Sawyer claimed that he had been denied his right to due process of law given him by the Fourteenth Amendment because he had not received a "speedy trial," and because the prosecutor had knowingly induced perjury on the part of Krause, the alderman whom Sawyer allegedly bribed. A hearing was granted on the petition to determine whether or not the petitioner's Constitutional rights had been denied. The District Court found against petitioner and dismissed the writ. Sawyer filed his notice of appeal and the District Judge issued a certificate of probable cause pursuant to 28 U. S. C. A. § 2253.

The petitioner relies on several alleged errors in the court below. First he claims that the trial judge erred in striking and refusing to consider the testimony of witness Paul A. Hemmy, an attorney whom the witness Krause had consulted. Krause, the alderman whom Sawyer was accused of bribing, had been convicted of accepting bribes on other occasions. At the time of the Sawyer trial Krause was serving a term in the Wisconsin State Prison for

having accepted a bribe. There were other charges pending against Krause, including the charge of having accepted the bribe from Sawyer. Krause was anxious to have the other charges against him dismissed because of the effect they might have on his application for parole.

Shortly before the first Sawyer trial Krause wrote a letter to Attorney Hemmy and asked Hemmy to visit him in prison. Hemmy testified below that Krause told him that he had not received money from Sawyer, and that Sawyer had never asked him to use his influence in altering the street widening plan. But Krause said that if Hemmy could get the prosecutor to dismiss the remaining charges against him, he would testify that he accepted a bribe from Sawyer. Hemmy refused to have anything to do with the plan, but he did make a note on the inside of a file cover about what Krause had said during their talk. All this was heard and examined by the trial judge subject to the respondent's objection that it was inadmissible both as hearsay and as a privileged disclosure made by a client to his attorney. After hearing all of Hemmy's testimony the District Judge ruled that it was a privileged communication between client and attorney and was not admissible. The District Judge, therefore, refused to consider it in making his decisions as to the facts. We think that in this ruling the trial court erred.

The attorney-client privilege has never prevented the disclosure of communications made in furtherance of a crime. *Alexander* v. *United States*, 138 U. S. 353; *Pollock* v. *United States*, 5 Cir., 202 F. 2d 281. In both these cases, however, the communications were admitted in the client's trial for the crime in furtherance of which they were made. In fact, the *Alexander* case expressed, as dicta, the opinion that the rule should be limited to trials for the crime in furtherance of which the communication was made. This suggestion has not been followed by trial courts, however. *A. B. Dick Co.* v. *Marr*, 95 F. Supp. 83,

102; *Securities & Exchange Commission* v. *Harrison*, 80 F. Supp. 226, 230-1. Wisconsin, too, has recognized this limitation on the privilege in all cases and not just in the client's criminal trial. In *Dunn* v. *Amos*, 14 Wis. 106, the plaintiff sought to set aside a fraudulently drawn deed; the court held that the testimony of the attorney who had drawn the deed was admissible against the client.

Wigmore approves this exception to the privilege in both criminal and civil cases and quotes the celebrated English case, *Annesley* v. *Earl of Anglesea*, 17 How St. Tr. 1229, in support of the position.

> "Mounteney, B.: For God's sake then let us consider, what will be the consequence of the doctrine now laid down and so earnestly contended for, that such a declaration made by any person to his attorney ought not by that attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offense [this was the actual circumstance in this case]; he is desirous and determined, at all events to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration; because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove this, *in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property.* Is this law? Is this reason? I think it is absolutely contrary to both * * *." 8 WIGMORE ON EVIDENCE, § 2298, p. 577 (3d ed. 1940). (Emphasis added.)

For additional authority see: *In re Cole*, 8 Reporter 105; *Kaufman* v. *United States*, 2 Cir., 212 Fed. 613; *Fuston* v. *United States*, 9 Cir., 22 F. 2d 66; *United States* v. *Bob*, 2 Cir., 106 F. 2d 37, 125 A. L. R. 502, certiorari denied 308 U. S. 589.

The lone dictum in the *Alexander* case notwithstanding, we think that the rule accepted by all courts today is that a client's communication to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding. As Judge Medina said in *A. B. Dick Co.* v. *Marr*, *supra:*

> "Nevertheless, it is quite clear that the privilege disappears if it is invoked merely to cloak a fraudulent scheme, and that when a client consults an attorney as to how to concoct or perpetrate a fraud the privilege is unavailing." 95 F. Supp. at page 102.

There can be no doubt that Krause's communication as related in court by his attorney, Hemmy, was on its face fraudulent and an attempt to have the lawyer assist him in the commision of a crime. Krause said that he did not receive any money from Sawyer, but that he would testify that he did if Hemmy could make a deal with the prosecutor to have the remaining charges against him dismissed.

Hemmy's testimony was not hearsay. Sawyer was only trying to prove the proposition that Krause made to Hemmy. Hemmy heard the statements directly from Krause. 31 C. J. S., Evidence § 192, gives a good capsule definition of hearsay evidence: "Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness." If Krause had told Hemmy of some objective occurrence he had observed, Hemmy's testimony of what Krause had said would be hearsay if offered to prove the occurrence Krause had observed. But when offered to prove only what he heard Krause say, Hemmy's testimony is not hearsay.

The court below should have admitted the testimony of Hemmy, and considered it in its determination of facts. But the appellant has not shown that he was prejudiced by the exclusion of this evidence. Of course, harmless error is not grounds for reversal, and the appellant has both the burden of proving error and of showing that he was prejudiced thereby. *Yazoo & M. V. R. R. Co.* v. *Mullins*, 249 U. S. 531, 39 S. Ct. 368; *McGivern* v. *Northern Pac. Ry. Co.*, 8 Cir., 132 F. 2d 213, 216; *Jennings* v. *United States*, 5 Cir., 73 F. 2d 470; *Marin* v. *Ellis*, 8 Cir., 15 F. 2d 321, 322; *Parker* v. *Elgin*, 6 Cir., 5 F. 2d 562, 564. Contra: *Inman Bros.* v. *Dudley & Daniels Lumber Co.*, 6 Cir., 146 Fed. 449; *Westall* v. *Osborne*, 2 Cir., 115 Fed. 282.

Hemmy's testimony was offered as tending to show perjury by the witness Krause in both trials in the state court. As the trial court pointed out, *Petition of Sawyer*, 129 F. Supp. 687, 696, Sawyer's Federal Constitutional rights were not denied unless perjured testimony was introduced with the knowledge of the prosecutor that it was perjured. *United States* v. *Spadafora*, 7 Cir., 200 F. 2d 140; *United States* v. *Ragen*, 7 Cir., 173 F. 2d 668; *Cobb* v. *Hunter*, 10 Cir., 167 F. 2d 888. The District Judge found: "* * * It is clear that [Special Prosecutor] Mount did not believe that Krause's testimony was perjured testimony. * * * *I cannot say from the* record before me that the perjury occurred when Krause testified at the trials." 129 F. Supp. at page 698. Unless we are convinced by the record as a whole that the District Court's acceptance of Hemmy's testimony could have changed this finding, we are not justified in reversing the judgment because of its exclusion.

Hemmy's testimony certainly could not be said to tend to establish the prosecutor's knowing use of perjured testimony. There was evidence, admitted by the District Judge, that went much more directly to that question. Carl Breitlow, a male nurse at the prison hospital where

Krause worked during his prison term, testified that he had heard Krause say that he had received nothing from Sawyer; that Krause had said that he had been called to Milwaukee to see the prosecutor in the *Sawyer* case and that upon his return he heard him say that he was very pleased with the deal he had made there. Breitlow also testified that he heard Krause explain the fact that he made this deal by saying that he had to get out of prison as soon as possible because of his wife's poor health. There is no question that the District Judge believed Breitlow's testimony.

In his published opinion the trial judge said:

> "Prior to the first Sawyer trial Krause was brought to Milwaukee, and on April 7, 1952, conferred with the special prosecutor for the State. Upon his return to prison after the trial he stated that he had made a good deal and that he was well pleased with the deal he got in Milwaukee. It is evident that some understanding was reached either between Krause and the special prosecutor or between Krause's attorneys and Mount * * *." *Petition of Sawyer*, 129 F. Supp. 687, 694.

Hemmy's testimony could not prove anything more than was shown by Breitlow's testimony and declared by the trial judge to be true. The question on which the court below found the evidence insufficient is the necessity of showing the prosecutor's knowledge that Krause's testimony was perjured. Hemmy's testimony, at most, would tend to show that Krause was willing to give perjured testimony. If allowance of the writ was dependent upon the court's believing what Hemmy said, then the exclusion of his testimony would have been prejudicial. But the court did believe that Hemmy gave a true account of what Krause had told him. What the lower court did not believe was that Krause was telling the whole truth when he talked to Hemmy, Breitlow, or any of the other witnesses.

Krause's credibility had been thoroughly considered by the state courts before the petitioner came to the Federal District Court on collateral attack. When he appealed his second conviction to the Supreme Court of Wisconsin, Sawyer also contended that as a matter of law he was entitled to judgment dismissing the indictment because the principal witness against him (Krause) was unworthy of belief; that the state's evidence was incredible; and that reasonable doubt of his (Sawyer's) guilt must exist in spite of such evidence. In its opinion (*State* v. *Sawyer*, 266 Wis. 494, 63 N. W. 2d 749) the Wisconsin Supreme Court, after reviewing the evidence, and after noting the contradictions between Krause's testimony and his prior statements out of court, the inducements for Krause to commit perjury and the strong motives for him to give testimony to please the prosecution even if the testimony were false, pointed out that the trial court had instructed the jury that Krause's interest in the result of the trial might be considered in determining his credibility, that Krause's testimony as an accomplice should be examined with the utmost care and caution, and that the jury should also consider that Krause had been promised that he would not be further prosecuted. After reciting all of these facts, the State Supreme Court said, 63 N. W. 2d, page 754: "We think the jury was thoroughly informed that Krause's testimony was *prima facie* unreliable * * *." But the Wisconsin Supreme Court then pointed out in detail the mass of other evidence which corroborated Krause's testimony against Sawyer that the alleged bribe was given and accepted. The court there held that there was sufficient evidence to support the verdict of the jury that Sawyer was guilty as charged in the indictment.

The Supreme Court of the United States denied Sawyer's petition for certiorari, 348 U. S. 855, and his request for a rehearing on that petition. 348 U. S. 890.

From the entire record we find the trial court's attitude toward Krause's changing stories very reasonable. It was certainly to Krause's benefit to deny guilt in the Sawyer matter, and he may well have thought that it would be to his benefit to holdout for as much as he could get before telling the truth. This is what the evidence, including the excluded testimony, tended to show. *But it did not prove that the prosecutor knew, or should have known, that Krause's testimony was false.* The exclusion of Hemmy's testimony in the habeas corpus proceeding is not prejudicial error because it was merely cumulative, and supported rather than contradicted the lower court's findings.

The above reasoning applies as well to the testimony of Knoll. Knoll was a fellow prisoner of Krause's, and testified in the court below that he had heard Krause say many times that he did not take a bribe from Sawyer. He also testified that Krause had strong reasons for wanting to get out of prison as soon as possible. The court below ruled that Knoll's testimony was purely cumulative to testimony heard at the Sawyer trial showing that Krause had protested his innocence until shortly before he testified to the contrary. The court concluded that such testimony alone did not furnish a basis for granting the writ. This conclusion was obviously correct.

The appellant contends that the lower court erred in not finding from the evidence that the prosecutor was guilty of misconduct in inducing Krause to testify falsely and thereby denied Sawyer his Constitutional rights. In discussing the lower court's rulings on the admissibility of evidence we have reviewed the strongest evidence which the appellant claims proves misconduct by the prosecutor. Our conclusion, above, that the evidence supports the court's finding that the prosecutor thought that Krause told the truth at Sawyer's trials, answers this contention. As the lower court pointed out, all of the issues of fact be-

fore it were involved in the two Sawyer trials. Both juries believed that Krause was telling the truth and no amount of merely additional evidence of the same kind justifies a reversal of that verdict on a collateral attack.

Sawyer also argues that the court below erred in holding that he was not deprived of due process of law under the Fourteenth Amendment because he failed to receive a "speedy trial."

On appeal from his first conviction the Supreme Court of Wisconsin found no merit in Sawyer's contention that he had not been given a speedy trial as required by Section 7 of Article I of the Wisconsin Constitution and that he was not entitled to a dismissal of the indictment on that ground. On this question the Supreme Court of Wisconsin said: "We are of the opinion that the defendant as a condition precedent to requesting dismissal of the criminal charge pending against him on the ground that he has been denied his constitutional right of a speedy trial must first have taken some affirmative action that the case be brought on for trial. This the defendant in the instant case did not at any time do." 263 Wis. 218, 56 N. W. 2d 811, 814. However, Sawyer's first conviction was reversed and remanded by the Wisconsin Supreme Court because a copy of the prosecutor's notes for his oral argument was inadvertently included in the exhibits which were sent to the jury room. *State* v. *Sawyer*, 263 Wis. 218, 56 N. W. 2d 811.

On his second trial the jury again found Sawyer guilty, and on his appeal from that judgment Sawyer again presented the argument that he had been denied a speedy trial in violation of both the State and Federal Constitutions. But the Supreme Court of Wisconsin, after pointing out that Sawyer had been free on bail since immediately after his arrest on the indictment and that he not only made no demand for trail but acquiesced in such delay as there was, concluded for the second time that "Sawyer was not deprived of a constitutional right."

The trial court was correct in holding that Sawyer was not denied rights given him by the Constitution because of any delay in bringing him to trial. It is clear that the Federal Constitution does not give an absolute right to a "speedy trial" as such to persons tried in state courts. The Constitutional right to a "speedy trial" is contained in the Sixth Amendment. It is common knowledge that the first ten amendments do not apply to state tribunals and that the Fourteenth Amendment, which does apply to the states, does not necessarily include all of the first ten. *Wolf* v. *Colorado*, 338 U. S. 25; *Adamson* v. *California*, 332 U. S. 46. Before we can order the release of a state prisoner for failure to obtain a "speedy trial," we must be convinced that the failure resulted in the taking of the prisoner's liberty or property without due process of law.

The right to a speedy trial is relative and must always be judged by the surrounding circumstances. *Beavers* v. *Haubert*, 198 U. S. 77; *United States ex rel. Hanson* v. *Ragen*, 7 Cir., 166 F. 2d 608. Under the circumstances shown by the record in this case the delay in bringing Sawyer to trial was not so unreasonable as to contravene his Constitutional rights.

The record shows that Sawyer was indicted on April 25, 1950, and the following day was released on bail. He has been at liberty on bail ever since, so that the delay in bringing him to trial has not resulted in any additional imprisonment.

Sawyer was arraigned on May 5, 1951, more than a year after he was indicted. This is not an unreasonable amount of time considering the fact that Sawyer filed an affidavit of prejudice against the Municipal Judge necessitating the appointment of a special judge, and the fact that Sawyer twice moved to dismiss the indictment listing sixteen grounds.

The state elected to try Krause first on charges that did not involve Sawyer. Krause was convicted and ap-

pealed to the Supreme Court of Wisconsin. His principal argument on appeal was that the grand jury, which had indicted both him and Sawyer, had been unlawfully constituted. If the court had upset Krause's indictment, it would have upset Sawyer's as well. It was only reasonable for the state to wait until the validity of the grand jury's action had been determined by the Supreme Court of Wisconsin before going to trial with the *Sawyer* case.

The only request for extra time made by the state was made on June 5, 1951, when it decided to try Krause first and Sawyer later. This delay was reasonable since the prosecutor could not try them both at the same time, and Krause had been indicted first.

Not only has Sawyer failed to show that the delay in bringing him to trial was unreasonable, but also he failed to ask the court before which his case was pending for an immediate trial. Acquiescence in the delay, by failing to ask the court for immediate trial, waives the right to speedy trial. *Miller* v. *Overholser*, D. C. Cir., 206 F. 2d 415; *Fowler* v. *Hunter*, 10 Cir., 164 F. 2d 668; *Shepherd* v. *United States*, 8 Cir., 163 F. 2d 974; *United States* v. *Albrecht*, 7 Cir., 25 F. 2d 93. Also see 129 A. L. R. 572 (Anno.).

Since it involves no prejudicial error, the judgment of the District Court is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, March 1, 1956

Before

HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

In the Matter of the Petition for Writ of Habeas Corpus for WALTER J. SAWYER

No. 11464

WALTER J. SAWYER, *Petitioner-Appellant,*

vs.

MAX A. BARCZAK, SHERIFF OF MILWAUKEE COUNTY, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Wisconsin

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, March 6, 1956

Before
HON. H. NATHAN SWAIM, *Circuit Judge*

In the Matter of the Petition of Walter J. Sawyer for a Writ of Habeas Corpus

No. 11464

WALTER J. SAWYER, *Petitioner-Appellant,*

vs.

MAX A. BARCZAK, Sheriff, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Wisconsin

Upon the foregoing petition, and on motion of Carl R. Becker, Attorney for petitioner;

IT IS ORDERED: That the mandate herein be stayed for a period of thirty days following the entry of the order denying the petition for rehearing herein.

IT IS FURTHER ORDERED: That if, within such thirty days, there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, the stay of mandate shall continue until final disposition by the Supreme Court.

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

Endorsed: "*Filed Feb. 18, 1955 Dale E. Ihlenfeldt, Clerk.*"

Civil Action No. 6477

In the Matter of the Petition of Walter J. Sawyer for a Writ of Habeas Corpus

WALTER J. SAWYER, *Petitioner,*

v.

MAX A. BARCZAK, Sheriff, *Respondent.*

Certificate of Probable Cause

On the records, files and proceedings in the above-entitled cause in which the petitioner's petition for a writ of habeas corpus was denied, and the petitioner having filed his notice of appeal to the United States Court of Appeals for the Seventh Circuit,

I, F. RYAN DUFFY, the judge in said cause, do hereby certify that there exists probable cause for the appeal.

Dated, Milwaukee, Wisconsin, February 18, 1955.

(Signed) F. RYAN DUFFY
Acting United States District Judge

MAY 1 19
HAROLD B. WILLEY

In The

Supreme Court of the United States

October Term, 1955

No. 809

WALTER J. JAWYER,

Petitioner,

v.

MAX A. BARCZAK, Sheriff,
Milwaukee County, Wisconsin,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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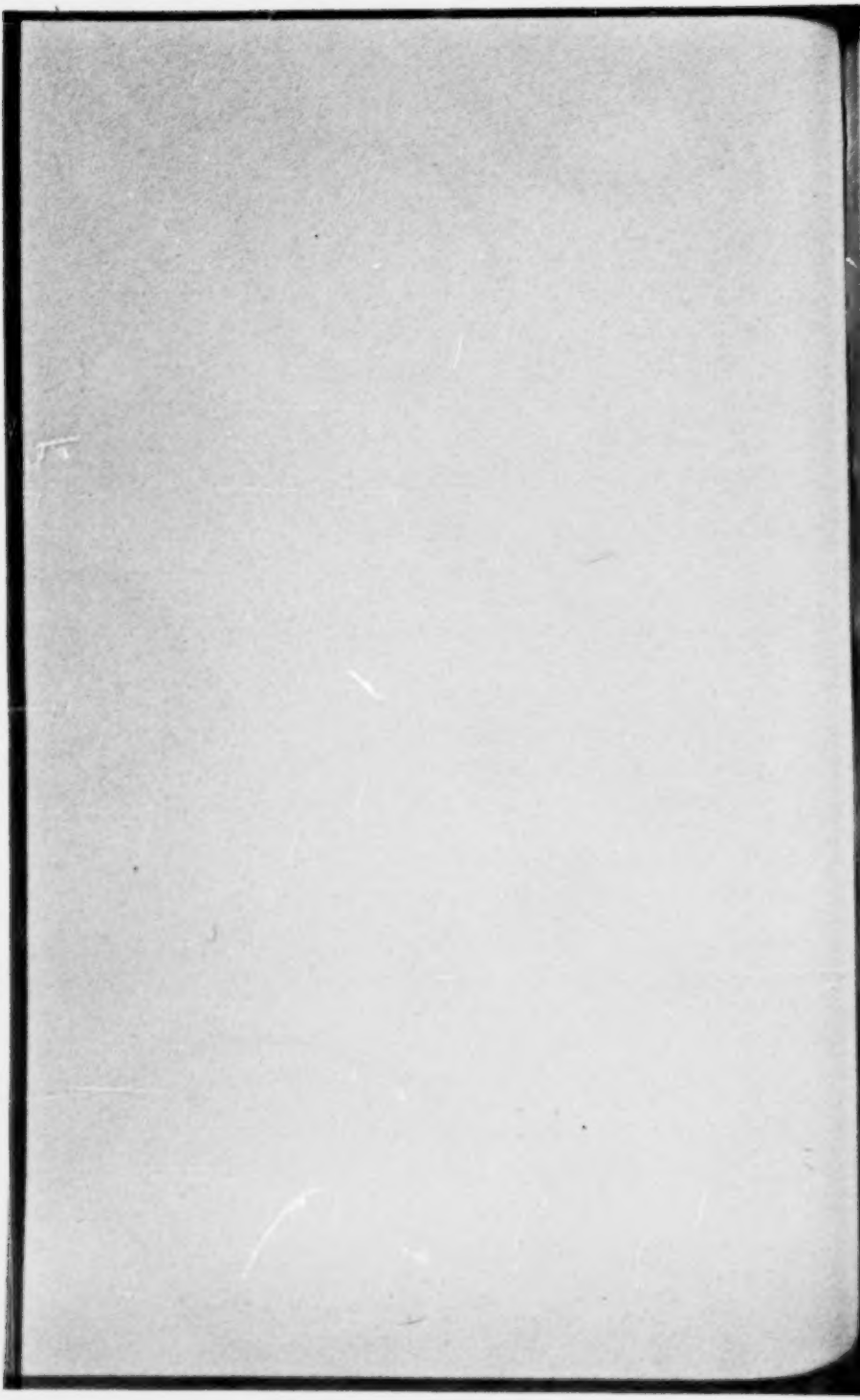

INDEX

PAGE

Questions presented 3

Statement of the Case 4-8

Facts 8-20

Jurisdiction 20

Reasons for Denying the Writ 21

Argument 21-67

SUMMARY OF ARGUMENT

I. Krause did not commit perjury at petitioner's trial in the state court 21-29

Krause's testimony that petitioner bribed him was corroborated by Alderman McGuire's testimony that petitioner orally admitted it to him, by petitioner's business records showing issuance of two $1,500 checks falsely entered as payment for nonexistent liabilities, and by the undisputed fact that petitioner sold Krause an automobile at cost when automobiles were scarce and petitioner was not giving any discounts 21-23

Two state court juries, fully aware of the circumstances surrounding Krause's testimony, believed him and two trial judges found the evidence sufficient 23-24

Fact that Sawyer building was not demolished and street was not widened in front of it is strong evidence that Krause earned the bribe money 24

PAGE

Testimony of convict Verne Knoll in district court was mere hearsay, cumulative to other evidence at petitioner's state court trial showing prior inconsistent statements by Krause. It is insufficient to establish prosecution's knowing use of false testimony ..25-27

Krause's pretrial unsworn self-serving denials of guilt are entitled to no weight or credibility 27

Krause's pretrial self-serving affidavit denying guilt, drawn by one of petitioner's attorneys, made to save petitioner from loss of his Buick franchise, does not prove Krause committed perjury at the trials of petitioner 28-29

II. The prosecutor did not use perjured testimony knowingly or recklessly 29-47

The prosecutor believed and still believes Krause's testimony 29-30

Decisions of this Court in *Mooney v. Holohan* and other cases do not support contention that something less than knowing use of perjured testimony warrants discharge on federal *habeas corpus* 30-31

Jones v. Kentucky, 97 F. 2d 335 distinguished on the facts 31-32

Perjured testimony must be entwined with other circumstances, not present here, to constitute denial of due process of law 32-34

The uncontradicted testimony was that there was no deal with Krause by the prosecutor to obtain his testimony, except that by operation of law Krause would obtain immunity in exchange for his self-

PAGE

incriminating testimony. The prosecutor in good faith determined this was a proper case for application of the immunity statute 34-36

The record does not support counsel's claim that the prosecutor concealed from the court an alleged agreement with Krause. At second Sawyer trial disposition of all other cases against Krause, including his parole and permission to go to California and be supervised there, were before the court and jury 37-39

Disposition of other charges against Krause after first trial of petitioner does not support claim of pre-existing agreement. Some charges were dismissed for lack of proof. Trial court suspended sentence on count to which Krause pleaded guilty because his practice was to give concurrent sentences and he would have done so had Krause been convicted of all charges at the same time. Trial judge did not believe it fair to jeopardize Krause's eligibility for parole because Krause had appealed his first conviction and therefore his second conviction was postponed until after he was eligible for parole on the first one 39-42

Prosecutor was in no position to control judicial discretion of trial court or official action of state parole authorities 42-43

There is nothing wrong in the prosecution giving Krause immunity, which requires approval of the trial court, pursuant to the Wisconsin immunity statute 43

Record does not support counsel's statement that Krause said he was gong to perjure himself 44

PAGE

Attorney Hemmy did not interpret Krause's remarks as revealing a corrupt intent to commit perjury 44-45

District court did not ignore testimony of convict Knoll and Attorney Hemmy 46

Convict Knoll did not testify Krause told him that he was going to testify falsely against petitioner in order to obtain his freedom 46

Prosecution did not conceal any alleged arrangement to grant Krause immunity 47

III. The court of appeals correctly held that the petitioner was not denied his constitutional right to a speedy trial and in that connection that he was not denied due process of law 47-60

Record on this issue is same as when case was previously in this Court on petition for *certiorari* to the Wisconsin supreme court, except for additional "facts" contained in Attorney Geisenfeld's affidavit and testimony 47

Attorney Geisenfeld's assertion for the first time in this proceeding, that he made numerous oral demands for trial upon the district attorney and the special prosecutor from the date of the indictment to the time of trial, is incredible. Throughout the litigation in the state courts, the state constantly asserted that petitioner had not made any demand for trial or taken any other affirmative action to obtain an early trial and petitioner and his attorneys never asserted the contrary 47-51

PAGE

Denial of speedy trial in a state court is not a federal question. This Court has held the Sixth Amendment guarantee of a "speedy and public trial" does not apply to state criminal prosecutions. The Fourteenth Amendment has not absorbed the first eight Amendments as such 51-52

Petitioner was not denied a speedy trial. Delays were caused by petitioner's affidavit of prejudice against trial judge, making necessary the calling in of an outside judge; by petitioner's motion to dismiss based on alleged errors connected with the grand jury, which issue was also raised in Krause's appeal to the Wisconsin supreme court; and by the pendency of other cases tried ahead of petitioner's case, all without objection from petitioner or request for trial 53-55

Petitioner's waiver of jury trial and consent to immediate trial by the court, objected to by the prosecution, was not a demand for immediate jury trial 55-57

At time of first trial of petitioner, no motion for dismissal was made on grounds of failure to grant speedy trial, nor was that mentioned in the motions after verdict. It was not again raised until petitioner's first appeal to the state supreme court 57

Affidavit of Attorney Geisenfeld, filed with second petition to this Court for *certiorari* to the Wisconsin supreme court, says nothing about repeated demands for trial 57

Wisconsin supreme court held defendant had not taken affirmative action to obtain early trial, in

PAGE

the absence of which he was not deprived of a constitutional right 57-58

Federal district court correctly held, on the merits, that petitioner was not deprived of a speedy trial .. 58-59

Petitioner did not file several motions to dismiss indictment on this ground. Prosecution did not object to immediate trial, but objected to waiver of jury trial 59

Counsel's statement that petitioner's case was not called for trial until after Krause had conferred with the prosecutor is incorrect. Case had been set for trial in March, 1952 and prosecutor had no conference or communication with Krause until April 7, 1952. State had subpoenaed other witnesses long before April 7 59-60

Counsel's assertion that Krause moved to California with the permission of the prosecution is untrue. Only state department of public welfare could give such permission and district attorney was not consulted about it nor did he communicate with the department 60

IV. The court of appeals correctly held that the exclusion of Paul Hemmy's testimony by the district court was not prejudicial since it "was merely cumulative, and supported rather than contradicted the lower court's findings" 61-67

Testimony of Hemmy and Knoll was without probative force to establish perjury by Krause at petitioner's trial. Such testimony was hearsay. Had Krause testified in this proceeding and been con-

PAGE

fronted with his alleged inconsistent statements, they would have been admissible to impeach him but not as substantive evidence, since Krause is not a party to this proceeding. The court of appeals erred in holding such testimony was not objectionable as hearsay 61-63

This court does not review state court judgments for reasons concerning credibility of witnesses and weight and sufficiency of evidence 63-64

Cases relied on by petitioner distinguished 64-66

Question whether erroneous exclusion of evidence was prejudicial in court trial is different from same question in jury trial. District and appellate courts were in best position to judge whether result might have been different had excluded testimony been admitted 66-67

Conclusion 68

TABLE OF CASES

Adamson v. California, (1947) 332 U. S. 46 52

Beavers v. Haubert, (1904) 198 U. S. 77 58

Black v. The State, (1884) 59 Wis. 471 43-44

Bridges v. Wixon, (1945) 326 U. S. 135 62

Burton v. United States, (1949) 5 Cir., 175 F. 2d 960 62

Coates v. Lawrence, (1942) 131 F. 2d 110 63

PAGE

Crawford v. United States, 212 U. S. 183 66

Ellis v. United States, (1943) 8 Cir., 138 F. 2d 612 62

Gaines v. Washington, (1928) 277 U. S. 81 52

Hawk v. Olson, 326 U. S. 271 ..... 61, 63

Hodge v. Huff, (1944) 140 F. 2d 686 32

Hubbard v. Jacques, (1951) 95 F. Supp. 894 26-27

Hysler v. Florida, (1942) 315 U. S. 411 30

Johnson v. Zerbst, 304 U. S. 458 ..... 61, 64

Jones v. Kentucky, (1938) 97 F. 2d 335 ..... 30, 32-33, 44

Little v. United States, 73 F. 2d 861 67

Miller v. United States, 120 F. 2d 968 66

Mooney v. Holohan, (1935) 294 U. S. 103 ..... 30, 32, 34, 39, 44

Moore v. Dempsey, 261 U. S. 86 65

Petition of Sawyer, (1955) 129 F. Supp. 687 58-59

Price v. Johnston, (1948) 334 U. S. 266 26

Sawyer v. Wisconsin, (1954) 348 U. S. 855, rehearing denied 348 U. S. 890 47

Southern Ry. Co. v. Gray, (1916) 241 U. S. 333 62

PAGE

Sparks v. United States, 241 Fed. 777 66

State v. Ketchum, (1952) 263 Wis. 82 56

State v. Krause, (1951) 260 Wis. 313 .....40-41, 48, 49, 55

State v. Sawyer, (1952) 263 Wis. 218 .....
.....4-5, 23-24, 28, 37-38, 48, 54-55, 57

State v. Sawyer, (1953) 266 Wis. 494 .....
..... .6-7, 8, 22, 24, 28, 39, 57-58

Tiberg v. Warren, (1911) 192 Fed. 458 63

United States v. Michener, (1945) 3 Cir., 152 F. 2d 280 .. 62

U. S. v. Spadafora, (1952) 7th Circ., 200 F. 2d 140 .....30, 61

United States ex rel. Hanson v. Ragen, (CCA 7th 1948)
166 F. 2d 608 .....52, 58

Walker v. Johnston, 312 U. S. 275 65

Wight v. Rindskopf, (1877) 43 Wis. 344 43

Wolf v. Colorado, (1949) 338 U. S. 25 52

Woolomes v. Heinze, (9th Circ.) 198 F. 2d 577 46

CONSTITUTION

PAGE

United States Constitution

Sixth Amendment 52

Fourteenth Amendment 52

STATUTES

Wisconsin Statutes

Sec. 57.06 7

57.13 ..... 7, 60

325.34 ..... 5, 35, 43

TEXTS

58 Am. Jur.—Witness § 770 62

§§ 775-780 62

In The

Supreme Court of the United States

October Term, 1955

No. 809

WALTER J. SAWYER,

Petitioner,

v.

MAX A. BARCZAK, Sheriff,
Milwaukee County, Wisconsin,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Walter J. Sawyer convicted on two counts of bribery by the state courts of Wisconsin, which conviction was approved on appeal to the Wisconsin Supreme Court, applied for a writ of *habeas corpus* to the district court of the United States for the eastern district of Wisconsin. The writ was discharged by the district court, Hon. F. Ryan Duffy, acting district court judge, and petitioner appealed to the court of appeals for the seventh circuit. The court of appeals affirmed the district court and petitioner brings this application for *certiorari* to review the said decision of the court below.

The judgment of conviction and sentence of one to two years on each count to run concurrently was entered July

31, 1953 in the municipal court of Milwaukee county, Wisconsin, since which time petitioner has been at liberty on bail. The opinion of the court of appeals appears in the appendix to the petition (p. 48). The decision of the district court is set forth at page 35 of the record filed in the United States court of appeals.

QUESTIONS PRESENTED

The "Questions Presented" as set forth on pages 3 and 4 of the petition are stated in the argumentative. Moreover the petitioner's statement of questions is replete with false and unsupported statements and assumptions of fact. We restate them in a briefer fashion, as follows:

1. Did the court of appeals correctly hold that the record in this case, including the testimony rejected by the district court, is insufficient to establish that Krause committed perjury at the trials in the state court?

2. Did the court of appeals correctly hold that the evidence before the district court, including that which was rejected, "did not prove that the prosecutor knew or should have known that Krause's testimony was false"?

3. Did the court of appeals correctly hold that the petitioner was not denied his constitutional right to a speedy trial and in that connection that he was not denied due process of law?

4. Did the court of appeals correctly hold that the exclusion of Paul Hemmy's testimony by the district court was not prejudicial error since it "was merely cumulative, and supported rather than contradicted the lower court's findings"?

STATEMENT OF THE CASE

Petitioner's statement of the case beginning on page 5 of the petition is so distorted by falsehood, half-truths and intemperate attacks upon the prosecutors as to render it completely unreliable for the purposes of this Honorable Court. A few of the many examples of counsel's distortion of the record will suffice to illustrate the point:

On page 7, counsel asserts that "the continuances were *all* had at the insistence of the prosecution." The fact is and the clerk's docket shows that the state requested only one adjournment on June 5, 1951, when the case was called primarily for the disposition of a motion to consolidate the Sawyer case and the Krause case for trial. The adjournment was granted for the very good reason that Krause was then in court, a jury panel was present and the state was about to proceed with the trial of Krause on an earlier indictment not involving Sawyer.

Similar language is used at the bottom of page 9.

On page 8, an excerpt from the decision of the Wisconsin Supreme Court relating to speedy trial is set forth but counsel has lifted it out of context to give an entirely incorrect impression. The language preceding the quotation on page 8 is: "While there may have been good reason for part of the delay in bringing the instant case on for trial * * *." Following the quoted provision, however, the Wisconsin court stated:

> "* * * However, the briefs of counsel cite no authorities holding that a defendant, such as Sawyer, is entitled to dismissal of the criminal proceedings against him for failure of the state to bring the case on for

trial where the defendant has taken no action on his own part to request that his case be brought on for trial.

"* * *

"We are of the opinion that the defendant, as a condition precedent to requesting dismissal of the criminal charge pending against him on the ground that he has been denied his constitutional right of a speedy trial, must first have taken some affirmative action demanding that the case be brought on for trial. This the defendant in the instant case did not at any time do." *State v. Sawyer,* (1952) 263 Wis. 218.

Beginning at the middle of page 8 and in numerous other places throughout the statement counsel asserts that the prosecution concealed or withheld information from the court, which would have demonstrated that a "deal" was made by the prosecution to obtain Krause's testimony. This false statement is then used throughout the brief as evidence that the testimony of Krause must have been perjured. The fact is, and an examination of the record will show, that the extent of the so-called "deal" with Krause was the granting of immunity to him from prosecution in connection with the Sawyer transactions upon his voluntary and self-incriminating testimony as an accomplice. Such immunity as Krause received was his by operation of law. Sec. 325.34, Wis. Stats.

He was represented at all times before the Sawyer trial by able counsel and presumably knew the full extent of his rights. Even after taking the stand he refused to testify until compelled by the court, so that there would be no question of his immunity from prosecution. It was

perfectly obvious that he was acting under the advice of his attorney, who was present in court at the time.

Instead of being "concealed" or "withheld" the subject of Krause's immunity was aired at great length, particularly in petitioner's second trial. Krause was cross-examined on the subject and it was strenuously argued to the jury in about the same manner as it is argued in the petition. In fact, the record and the briefs in the state courts were so full of references to the subject that the trial judge instructed the jury on the matter and the Supreme Court of Wisconsin made the following comment: *State v. Sawyer*, 266 Wis. 494, 502:

> "There is not the slightest doubt that there were strong motives for Krause to testify in such a way as would please the prosecution even if the testimony did not conform to the fact. Counsel for appellant forcefully pointed out to this court what the motives were and attributed Krause's change of front to them. We cannot doubt that he was equally emphatic when he addressed the jury. Furthermore, the trial court instructed the jury that the witness' interest in the result of the trial may be considered in determining his credibility, that the evidence of an accomplice (naming Krause) should be examined with the utmost care and caution and the jury should also consider that Krause had been promised that he would not be prosecuted; also that the law assumes that a witness who has been convicted of a crime may not be as worthy of belief as a witness who has not and the jury may bear this in mind in determining his credibility and the weight to be given to his testimony. We think the jury was thoroughly informed that Krause's testimony was *prima facie* unreliable and if there was no

other evidence than his against the defendant it would have been surprising indeed if the jury had convicted.

"But there was other evidence * * *."

Again on page 11 it is asserted that "Krause defended the perjury he was going to give in the Sawyer trial on the ground there was no other way out." This statement is made although there is no evidence whatever by Knoll, Hemmy or any one else to indicate that Krause proposed to give perjured testimony. He did speak of "changing his story" in the Sawyer case in order to get leniency. Counsel assumes from this that Krause's original denials of guilt must have been the truth and his later testimony must have been false.

At the top of page 16 counsel assert:

> "In August 1952 Krause was granted parole and in addition, special permission was given to him to leave the State of Wisconsin while under parole and go to California. Thus, it is obvious payment of the price demanded by Krause for changing his testimony was made by the prosecution."

The granting of parole is exclusively the business of the Wisconsin state department of public welfare, a non-political agency of state government, under sec. 57.06, Wis. Stats. The granting of permission to go to California requires the joint action of the Wisconsin state department of public welfare and the parole authorities of the state of California, pursuant to the interstate compact for out-of-state parolee supervision, sec. 57.13, Wis. Stats. Neither of these things could possibly be influenced by the Milwau-

kee county district attorney's office or the special prosecutor.

At the bottom of page 16 it is charged that the prosecutor "*procured the judge* to suspend the imposition of sentence which enabled Krause to obtain parole."

This kind of intemperate and opprobrious abuse of prosecutors appears throughout the petition. It is entirely unjustified, unwarranted and in our opinion a reckless and reprehensible practice.

On page 18 it is asserted that Attorney Vaudreuil *testified* to certain matters relating to the trial. Mr. Vaudreuil has never testified in this case at any time. It is true that he filed an affidavit at one stage of the proceedings, as to which there was no opportunity for cross-examination (R. 189).

In view of the wholly unreliable nature of petitioner's "Statement of the Case" we deem it necessary to burden this brief with a complete statement of the facts.

FACTS

(Record references are to state court appeal documents in *State v. Sawyer*, August Term, 1953, State No. 17, 266 Wis. 494.)

The petitioner, Walter J. Sawyer, has been engaged in the sale of automobiles in Milwaukee since 1937, both as a salesman and as a dealer. From 1941 to 1951 he operated under the corporate names, Sawyer Downtown Motors, Inc. (Wells Street location), and Sawyer Buick Co. (51st and

Lisbon location), in both of which he was the active executive manager and the principal owner.

Sawyer Downtown Motors, Inc., occupied the garage and salesrooms at 614-625 West Wells Street from 1941 to 1947 under a lease from the Gilman Estate, former owner of the property. In 1948 the Sawyer Company was paying $450.00 per month rent to the city but at the time of trial it was $1200.00 per month, although as a result of the street widening project it was necessary permanently to close up the Wells Street (front) entrance to the garage. It was apparently a very desirable location.

Pursuant to a long-range civic center plan, the city of Milwaukee acquired the property during the term of the lease along with all other property in the same block and several adjacent blocks between Wells and State Streets. After 1947 and up to the time of trial, petitioner's corporation occupied the premises on a month-to-month basis as a tenant of the city.

In 1946 the city engineer's office prepared a map or plan of the proposed development (Ex. 22, not printed), which was somewhat revised in October, 1948 (Ex. 23, not printed), from which it appears that the proposed widening of West Wells Street would take 14 feet of the entire south or front end of petitioner's building. This plan required demolition of all of the buildings on the north side of West Wells Street between North 6th and North 7th Streets, including the Sawyer garage (Ap. A. 269). This was the case under the 1946 plan, as well as the 1948 plan.

In October, 1948, the common council, after the customary committee procedure, directed the commissioner of

public works (Walter J. Swietlik) by formal resolution (Exs. 3 and 5; Ap. A. ii, iv) to proceed with the West Wells Street widening project and to evict certain tenants. Accordingly, the departmental machinery was set in motion and the tenants in 17 city-owned properties on West Wells Street, including the Sawyer Co., were notified to vacate in 90 days. On December 29, 1948, Mr. Walt, city real estate agent, caused a 90-day notice to vacate to be served on the Sawyer Co. (Ex. 17; Ap. A. xi).

On April 4, 1949, Mr. Walt reported to Mr. Swietlik on the status of the 17 properties Swietlik had previously designated for demoltion. This report indicated that Sawyer had not vacated nor made any agreement to do so (Ap. A. 252). Between April 4 and April 8, 1949, Mr. Swietlik determined that it would not be necessary to destroy the buildings on the north side of Wells Street west of North 6th Street (including the Sawyer building). Swietlik testified that the decision to exempt the Sawyer building from demolition and permit the Sawyer Co. to remain in possession was made shortly before April 8, 1949, largely as a result of discussions with the common council committee on streets, alleys and sewers; that in the course of his many appearances before and discussions with said committee he frequently saw Alderman Krause at those meetings; that the matter of evictions of tenants from city-owned property was discussed with him by the committee.

Thereafter the widening project proceeded to completion but the north half of the newly widened street between North 6th Street and North 9th Street is 12 feet narrower than the south half (Ap. A. 279). Between North 6th Street and North 9th Street, the streetcar tracks are off-center by

about 8 feet. The Sawyer garage and other buildings on the north side of West Wells Street remained standing.

In relation to this extraordinary situation, the following facts are also disclosed by the record in this case:

Albert J. Krause, newly elected alderman of the 20th ward in the city of Milwaukee, was an old friend of the petitioner, Walter J. Sawyer. They had played ball together as boys and in later years Krause had bought one or possibly two cars from Sawyer. Krause remembered buying only one car in 1941, at which time Sawyer gave him a discount equal to the salesman's commission. The 20th ward is in the far northwest side and the Sawyer Downtown Buick Co. was located in the downtown 4th ward which was and is represented by Alderman Charles Quirk.

Krause, who was also indicted for bribery based on the transactions involved herein and many others, became a witness for the state in the Sawyer trial under a grant of immunity and the counts in the Krause indictment relative to the Sawyer matter were *nolled* on the state's motion. He testified that on May 7, 1948, shortly after his election, he ordered a new Buick from Sawyer and paid $100.00 down but expected to wait a long time for delivery because new cars were scarce.

In the late summer and fall of 1948 as the result of public hearings by a common council committee and newspaper stories, the proposed Wells Street widening project became a subject of public discussion, particularly among the businessmen and residents along West Wells Street.

Shortly after Labor Day, 1948, Krause, who frequently stopped at the Sawyer establishment on Wells Street, was

asked by Sawyer to look into the matter and find out whether the Sawyer building was coming down (Ap. A. 138).

A few days later Krause reported to Sawyer that the widening project was on the 1949 construction program. Sawyer asked Krause to use his influence to see that the Sawyer building would be saved, stating that if the building could stand it would be worth $3000.00 to him (Ap. A. 138). Later Krause demanded that in addition to the $3,000.00, Sawyer sell him the car he had on order at cost and Sawyer agreed (Ap. A. 143-4). However, the actual price of the car was not determined until later because neither the delivery nor the wholesale price of the new 1949 models had been announced.

Krause testified that he attended committee hearings and interviewed other aldermen and city officials for the purpose of saving the Sawyer building from demolition and to insure Sawyer's continued occupancy of the premises (Ap. A. 151).

On March 19, 1949, Sawyer delivered a new Buick to Krause at but little more than his actual cash cost of $2,386.41, although the regular established retail price of the car was $3,063.47, and although neither the petitioner nor the Sawyer Downtown Buick Co. had granted any discounts whatever for months prior to March 19, 1949, and no total discounts for months thereafter (Ex. 30, not printed).

It appeared from the petitioner's own records that on April 30, 1948, the Sawyer Co. had 1045 unfilled new car orders (A. Ap. 376; Ex. I, A. Ap. xxxv) and on March 1, 1949 held over $42,000.00 in down payments on such orders (A. Ap. 311; Ex. 51, A. Ap. xxviii). In June, 1949, the peti-

tioner sold his wife's nephew, Leonard Bursten (who was also one of his attorneys) a new car at a partial discount but still made a profit of over $300.00 (A. Ap. 394). The petitioner's explanation for giving Krause almost the full discount was that he was an old friend and because he pestered him (A. Ap. 395, 397, 398).

Krause swore that Sawyer personally paid him $1500 in cash in April, 1949, and another $1500.00 in cash in May of 1949, both payments being made in Sawyer's place of business on Wells Street and in accordance with the earlier bribe agreement (A. Ap. 145-150).

The petitioner took the stand in his own defense and denied that he had ever paid Krause any money or that he had ever discussed the Wells Street widening project with him. The record shows, however, that Krause did perform a number of services on behalf of the Sawyer Company at the city hall during the period in question with reference to alteration of the building and premises by the city contractors and construction crews.

On cross-examination the petitioner was called upon to explain two checks for $1500.00 each, drawn on the Sawyer Downtown Buick Co. account, dated April 19, 1949, and May 18, 1949, respectively, and signed by the petitioner, payable to Charles Geisenfeld, his attorney (Exs. 33 and 35; Ap. A. xvii, xviii). Although these checks were drawn and cashed within a day or two before the dates on which Krause claimed he received such payments of $1500.00 each from the petitioner, he, Sawyer, denied that there was any connection between the checks and Krause. It also appears from the record that within a few days *after* the cashing of these checks of $1500.00 each by Geisenfeld, Krause

came in and paid in cash the notes on his new car in the sum of $1500.00 and $571.94, respectively (Exs. 13 and 14; Ap. A. viii).

It was contended that the two checks for $1500.00 each were payments to Geisenfeld for construction work. There were many other checks from the Sawyer Co. to Geisenfeld and to his construction corporation (M. & C. Construction Co.) during 1949, but *all* except the two for $1500.00 each were apparently deposited to the bank account of the payee (see Exs. 38, 40, 43; Ap. A. xx, xxi, xxii). These two checks alone (for $1500.00 each) apparently were cashed by Atty. Geisenfeld at the county treasurer's office (Exs. 33 and 35; Ap. A. xvii, xviii).

Duane Powell, bookkeeper for the Sawyer Company, testified upon the first trial of this action but was permanently absent from the state at the time of the second trial. After a proper predicate was laid the court permitted relevant and material portions of his former testimony to be read in evidence (Ap. A. 305 and following). He identified books and records of the petitioner's company and traced the discount to Alderman Krause through these books. He also testified that Mr. Sawyer was very active in the supervision and management of the business and that he "really worked at it" (Ap. A. 313).

On cross-examination the petitioner admitted that he had signed and delivered the two checks for $1500.00 each to Mr. Geisenfeld on the dates appearing on such checks and that he knew Geisenfeld was doing some construction work for him, but did not know how far it had progressed, and that the payments were in the nature of advancements

(Ap. A. 418). It appears from the books of account of the Sawyer Company that the two checks for $1500.00 each were allocated to account #286, "Leaseholds and Improvements" (Ex. 37; Ap. A. xix). Specific entries in this account were:

"Labor and material to fill lot—4/19/49—$1500.00."

"Labor and material on used car lot—5/31/49—$1500.00."

It appeared, however, that the lot referred to in Ex. 37 was owned by the Schlitz Brewing Co. *which paid the cost* of restoring the lot to a useful condition (Ap. A. 418-419).

Although it was claimed that Mr. Geisenfeld submitted a handwritten invoice (Ex. 45; Ap. A. xxiv) on *September 30*, 1949, in the amount of $3,195.20 in support of the two $1500.00 checks, this invoice was for *repairs* and *additions* to buildings. Nevertheless, corporate tax returns and financial reports to General Motors Corporation filed in 1950 still showed the $3000.00 as charged to the used car lot in accordance with Account No. 286, "Leaseholds and Improvements" (Ex. 37; Ap. A. xix).

It appeared further that the only work performed by Mr. Geisenfeld on the used car lot in question had been completed *before* the April 19 check for $1500.00, and had been paid for by a check dated April 14, 1949, in the amount of $411.50, which specified that the same was for "Labor and Material to board up lot at corner of 7th and Wells" (Exs. 38 and 39; Ap. A. xx). A further check in the amount of $63.50 (Ex. 40; Ap. A. xxi) was issued to Geisenfeld and Geisenfeld, supported by an invoice (Ex. 42; Ap. A.

xxii), showing that it was for "Carpenter labor for used car lot southeast corner 7th and Wells Street."

It seems that no further work of any substantial nature was done by the petitioner on that lot; nevertheless the two checks for $1500.00 each were carried in the books and records of the company as payments on account of filling and repairing said lot all through the year 1949, and the purported invoice to support such payments was not produced until September 30, 1949, when it was written out by Mr. Geisenfeld in his own handwriting in the petitioner's office and in the petitioner's presence (Ap. A. 427). But even after this invoice (Ex. 45; Ap. A. xxiv) was presented the books and records of the Sawyer Corporation, particularly Account No. 286, were not changed.

Further testimony given on the former trial by the witness Duane Powell to the effect that the petitioner instructed him to make the false entries in Account No. 286 as to the two $1500.00 checks, was ruled inadmissible by the trial court and the state's request to read such testimony to the jury was denied (Ap. A. 456-459).

Alderman Milton J. McGuire, president of the common council, was called as a witness for the state and testified that just before the re-opening of West Wells Street in the fall of 1949 he investigated rumors with references to improper conduct of public officials in connection with that project. He testified regarding a meeting of Wells Street businessmen and city officials held at Lakota's Restaurant at North 6th and West Wisconsin Avenue to plan for a celebration of the forthcoming Wells Street opening. He said that he and Alderman Quirk (who represented the ward in which the street widening took place) went over

to see Sawyer at this meeting for the purpose of asking him if he had paid any money to Krause. The direct question was asked of Sawyer by McGuire in Quirk's presence but before it was answered Quirk was called away to a nearby table out of hearing distance. In response to the question, Sawyer replied, "Yes, three thousand" (Ap. A. 292). Sawyer then promised to call McGuire later and let him know more about it. According to McGuire, Sawyer did call him a few days later, referred to the conversation at Lakota's and amplified his earlier remarks by saying that he (Sawyer) understood that the $3,000.00 was to have been split between three aldermen, including Krause (Ap. A. 295).

The last conversation between McGuire and Sawyer took place two or three weeks later when Sawyer called McGuire and claimed that McGuire had misunderstood his original statement; that he, Sawyer had said at Lakota's that he had given Krause a $3,000.00 "heap" and that Krause had paid for it. But McGuire said he did not understand Sawyer to say that he had given Krause a $3,000.00 "heap" and that no such statement was made in the original conversation.

Although the defense claimed that the first personal conversation between Sawyer and McGuire had been interrupted, which was advanced as the reason why McGuire's version of the conversation was incorrect, the petitioner, Sawyer, in his own testimony, related the substance of a rather lengthy conversation *following* his answer to McGuire's question concerning a payment to Krause (Ap. A. 381).

Alderman Quirk corroborated McGuire in all respects, except as to the actual conversation which took place out of his presence between McGuire and Sawyer. Quirk claimed that he interrogated Mr. Sawyer first as appears in the record (Ap. A. 302), but received no response on the subject of bribery.

The petitioner Sawyer contradicted and denied the testimony of McGuire as to his alleged admission of paying a bribe to Krause.

Krause testified to two later meetings with Sawyer in December of 1949 and again in January, 1950, after some of the charges appeared in the newspapers. He said that he tried to persuade Sawyer to retract his statement to McGuire at Lakota's and offered to return the $3,000.00. He then at Sawyer's suggestion, went to Sawyer's attorney, Mr. Geisenfeld, who advised him to resign as alderman and leave town. Krause followed Geisenfeld's advice.

Mr. Swietlik testified that although he was in charge of the departments conducting the project, the common council was the highest authority which set policies and that he discussed the question of evictions of city tenants with a common council committee (R. 435; Ap. A. 260).

Further facts were established by the U. S. district court in formal findings of fact appearing at pages 45-53 of the record in the court of appeals. The following findings are especially important:

> "19. Krause swore falsely either when he executed the affidavit of April 21, 1951 or when he testified completely to the contrary on the two Sawyer trials. This was one of the issues submitted to the

juries when the Sawyer trials were held. Krause's contrary affidavit of April 21, 1951 was before them. On the second trial, there was received into evidence the testimony of a prison nurse and also a prison guard who had heard Krause first maintain that Sawyer was innocent, and then, after the first trial, tell about the good deal he made in Milwaukee.

"20. In the second trial, the judge instructed the jury that in considering the weight to be given to Krause's testimony they should consider 'Krause was promised that he himself would not be prosecuted.' Nevertheless, each jury apparently believed that Krause was telling the truth when he testified at the trials.

"21. With two exceptions all of the testimony before me offered on behalf of petitioner, was considered by Wisconsin State courts in the two jury trials, and upon the appeals to the Wisconsin Supreme Court.

"22. One of the witnesses who testified in this Court, but did not testify in the trials in the State Courts, was Paul Hemmy, Jr., an attorney residing at Juneau, Wisconsin. On February 2, 1952, Krause wrote to Hemmy asking him to come to the prison to discuss a 'very important personal legal matter.' On February 13, 1952, Hemmy conferred with Krause at the prison. It is clear that Krause consulted Hemmy professionally.

"23. Verne Knoll, a former attorney and Krause's fellow prison inmate who had been sentenced on sixty-five counts for a minimum of twenty-seven years and a maximum of sixty-five years on charges of fraud, forgery and larceny as bailee testified on this hearing. Krause discussed his troubles with Knoll on a number of occasions. The testimony of Knoll as well as that of Hemmy, as to the statements made by Krause,

was received subject to the objection that it was hearsay.

"24. Knoll testified to further statements which he claimed Krause made to the effect that Krause was willing to and did change his previous story because his parole application was pending and that he had to make parole, a compelling reason therefor being the illness of Krause's wife.

"25. Krause was not a witness in the proceedings before me.

"26. It is clear that Special Prosecutor Mount did not believe that Krause's testimony was perjured testimony. I cannot say from the record before me that the perjury occurred when Krause testified at the trials."

JURISDICTION

Respondent opposes the granting of a writ of certiorari on the grounds:

(1) That the issue of the credibility of the witness Krause having been fully litigated in the State Courts, does not present a Federal question;

(2) That the facts of this case do not present any substantial Federal question of denial of due process of law in violation of the Fourteenth Amendment in connection with (a) alleged denial of speedy trial or (b) the conduct of the prosecutors.

REASONS FOR DENYING THE WRIT

Decision of the court below rests upon sound reason and ample precedent and authority—consistent with previous decisions of this Court and an overwhelming majority of other courts of appeals. The cases cited by counsel and claimed to be contrary to the decision of the court of appeals in this case are easily distinguishable. The record shows that petitioner, during the past six years has had all of the "due process of law" that any citizen, regardless of rank, wealth, station or influence, could possibly command. There is nothing in this record to justify the interference of this Court since every question of ultimate fact has been submitted to and considered by state court juries, and all pertinent and relevant questions of law, as well as questions of fact, have been carefully reviewed and properly resolved by the state supreme court and the federal district and appellant courts.

ARGUMENT

I. KRAUSE DID NOT COMMIT PERJURY AT PETITIONER'S TRIAL IN THE STATE COURT.

1. *Before discussing the rather flimsy basis of petitioner's claim that Krause committed perjury on the trial, we believe it would be most helpful to set forth the particular facts and circumstances which establish beyond question that Krause told the truth in his testimony in the state court.*

a. Alderman Milton J. McGuire, President of the Milwaukee Common Council, testified to an admission of peti-

tioner that he, the petitioner, had given Krause $3,000.00. This testimony was unshaken by cross-examination and stands as a verity in the case (A. Ap. 292, 295; 2nd *Sawyer* appeal).

b. Krause was fully corroborated as to the details of the bribe transaction by petitioner's own books and records from which the bribe payments in the exact amounts claimed by Krause were traced to two checks falsely entered in the books of account of petitioner's corporation and drawn under questionable circumstances for the payment of a non-existent liability. As to this transaction, the Supreme Court of Wisconsin said: (*State v. Sawyer*, (1953) 266 Wis. 494, 505-506)

> "* * * The inference is plain that Geisenfeld cashed the $1,500 checks as an accommodation to Sawyer and returned the cash to him and that was the money which Krause got from Sawyer a day or two later. The fictitious book entries were repeated as deductions in Sawyer's income-tax returns.
>
> "This evidence goes far to corroborate Krause,—*we think sufficiently far*,—and the false entries in the books of account throw great doubt on Sawyer's veracity. * * *" (Italics supplied.)

c. It is undisputed that petitioner sold Alderman Krause an automobile at cost at a time when automobiles were scarce and it was not the practice of petitioner to give any discounts; at a time also when petitioner had on hand over a thousand unfilled orders and over $40,000.00 of customer's advance deposits. Petitioner's explanation of this circumstance was unconvincing and inconsistent with the plain facts of the case. Here again the inference is fully

warranted that petitioner gave Krause a discount of $600.00, the true consideration for which petitioner was unwilling to admit.

d. Two trial juries found the petitioner guilty and thereby announced that they believed Krause and did not believe Sawyer. Contrary to counsel's statement that the prosecution suppressed the facts at the trial relating to the disposition of Krause's remaining counts and charges, which occurred between the first and second Sawyer trials, the record clearly shows that Krause was cross-examined vigorously on this question, and the defense vainly sought to elicit an admission from him that such disposition was pursuant to a pre-existing understanding with the prosecution. The jury in the second trial had full knowledge of all facts and circumstances which tended to discredit or impeach Krause's testimony, but they, nevertheless, chose to believe him, as they had a right to do, to the extent that his testimony was corroborated by other credible evidence.

e. In the first *Sawyer* trial the learned trial judge held:

> "The court is satisfied that there was sufficient evidence before the jury which, if believed by the jury, would justify the jury in returning a verdict of guilty." (Ap. A. 111; *State v. Sawyer*, Aug. Term 1952, State No. 24.)

As to this ruling, the Wisconsin Supreme Court, in its opinion stated: (*State v. Sawyer*, (1952) 263 Wis. 218, 225.)

> "We have reviewed the testimony and evidence in this case and fully concur that the trial court was right in concluding that the same was sufficient, if believed by the jury to warrant the jury in returning a verdict of guilty. In view of the fact that there must be a new

trial we refrain from commenting on such evidence at this time."

f. In the second Sawyer trial motions after verdict were made, claiming, among other things, that the evidence was insufficient to convict and urging that the testimony of Krause was false. On this question the learned trial judge held:

> "The Court is satisfied that there is sufficient credible evidence in this case to support the verdict of the jury finding the defendant guilty on each count of the indictment." (Ap. A. 101; *State v. Sawyer*, Aug. Term 1953, State No. 17.)

g. The fact that the Sawyer building was saved from demolition and remained standing for several years as a silent accuser of the petitioner, blockading a substantial portion of one of Milwaukee's main downtown arteries, was doubtless considered by the juries as strong evidence that Krause had done his work well and that the result was obtained by reason of the corrupt agreement testified to by Krause and admitted by petitioner to Alderman McGuire.

h. The decision of the U. S. district court in this case contains the following statement (R. 43):

> "* * * Furthermore, although Krause did perjure himself either when he executed the affidavit of April 21, 1951 or when he testified at the trials, *I cannot say from the record before me that the perjury occurred when Krause testified at the trials.*" (Italics supplied.)

Thus it appears that *no* judge, trial or appellate, state or federal, has ever been convinced that Krause committed perjury at the trial.

We now propose to review the several contentions of petitioner in support of his claim that Krause perjured himself at the trial.

2. *The district and appellate courts were correct in evaluating the testimony of convict Verne Knoll as being merely cumulative to similar testimony at petitioner's trial in the state court and that it might well have been stricken as hearsay.*

The district court held:

> "Insofar as Knoll testified that Krause protested his innocence in the Sawyer case up to a short time before the date of the first trial, it was entirely cumulative to testimony received on the trials, and would not, in itself, be a basis for the granting of a writ of habeas corpus." (R. 42.)

As to Knoll's version of Krause's statements regarding an agreement with the district attorney, the trial court quite properly took a dim view of its probative force. In reality, it was hearsay compounded with more hearsay. In effect, Knoll gave *his* version of *Krause's* version of the prosecutor's statements in dismissing the state's charges against him (Krause) relating to the Sawyer case; but what is really fatal to petitioner's cause is the attempt to lift the hearsay *"admissions"* of Krause's *innocence* to the dignity of substantive evidence. Counsel's argument is absurd; they not only seek to establish hearsay evidence by

Knoll without laying the necessary foundation by prior interrogation of Krause, but attempt to use Krause's *self-serving* declarations of *innocence* as *substantive evidence and proof of Sawyer's innocence.*

In *Price v. Johnston,* (1948) 334 U. S. 266, the prosecution was accused of using undue pressure on the government's chief witness to change his testimony and using such testimony knowing that it was perjured, to obtain petitioner's conviction. While an order denying the writ was reversed on procedural grounds, this court said (p. 288):

> "* * * A mere claim that a witness gave inconsistent testimony is not enough to charge the prosecution's knowing use of false testimony; it may well be that the witness' subsequent statements were true, in which event the claim of inconsistency is not a constitutional objection. * * *."

In *Hubbard v. Jacques,* (1951) 95 F. Supp. 894, a situation almost identical with the instant proceedings was decided by the U. S. district court for the Western district of Michigan. In denying the writ of *habeas corpus,* the court said (p. 896):

> "* * * Although a conviction procured by perjured testimony is without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States, Mooney v. Holohan, Warden, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, there is no satisfactory showing that in the present case Hubbard's conviction resulted from the use or admission of perjured testimony. The testimony objected to is that of Curtis Stiles, an accomplice in the robbery. The transcript indicates that Stiles had made statements to the

State police, which were in contradiction of his testimony at the trial. However, his testimony at the trial was under oath, while statements made by him to the State police were not. It appears that Stiles was questioned at length and that the jury was fully informed of the contradictory statements he had made. The jury was the sole judge of the facts and of the credibility of witnesses and the weight to be given their testimony."

3. *It is claimed that the many instances of Krause's denial of guilt to the city officials of Milwaukee and to guards and inmates at the prison is evidence that he perjured himself upon the trial. The contention is wholly without merit.*

Krause had pleaded "not guilty" when arraigned upon the charge of bribery in connection with Sawyer. Thereafter, no sane man in his position would have done anything else but consistently deny his guilt to others in support of his not guilty plea. It is well known that most persons accused of crime, whether guilty or not, stoutly maintain their innocence until the courts determine otherwise. All of Krause's statements protesting his innocence were, of course, self-serving, and not being under oath, are not entitled to any weight or credibility whatsoever. District Attorney McCauley summed it up in his testimony:

"I knew that up to one week prior to the trial Mr. Krause had consistently maintained that he was innocent and had pleaded 'not guilty' to these charges, and I also know that that is the privilege of every defendant. That, of course, happens in my office all the time, when I know they are guilty, they still plead innocent." (R. 93.)

4. *The self-serving affidavit of Krause, executed before the trial, absolving himself and Sawyer from guilt, does not establish that Krause committed perjury at the trial.*

It might be well to review the record on his question and show the circumstances surrounding the execution and use of this affidavit. Upon his second trial, Sawyer testified as follows relative to the affidavit (Pet. Ex. 5, R. 177) (A. Ap. 424, *State v. Sawyer*, Aug. Term, 1953, State No. 17):

> "I have seen Defendant's Exhibit (A). It is an affidavit signed by Albert J. Krause. I saw that for the first time some time in April, 1951, when it was given to me by Dinny Sullivan, the attorney. Prior to that time I had been asked if I could get something of that kind and I mentioned it to Mr. Geisenfeld who said he would call Eugene Sullivan to have an affidavit prepared stating what the facts were in this story. I was asked to get an affidavit by Buick Motor Car Company. I don't know where Exhibit (A) was prepared. I received two copies; but I don't know what was done with the other copy which must have been mislaid either at my home or at my office. I didn't send it to Buick Motor Car Company."

Attorney Geisenfeld, one of Sawyer's attorneys, had testified on the first trial that he had prepared the affidavit (Ex. A) after consulting with Eugene Sullivan, who was Krause's attorney, (Ap. A. 331; *State v. Sawyer*, Aug. Term 1952, State No. 24). Krause did execute the affidavit at Sullivan's suggestion, and copies were delivered by Dennis Sullivan to Mr. Sawyer. The purpose of the affidavit is clear. It was to allay the fears of Buick Motor Car Com-

pany as to Sawyer's involvement in a criminal offense. It was self-serving as to both of them and is without any significance whatever as to the guilt or innocence of either of them.

The affidavit appears as petitioner's Exh. No. 5 (R. 177). The nature and purpose of the affidavit is such that it can hardly be elevated to the dignity with which counsel seek to clothe it. The state surely is not bound by any such affidavit where there was no opportunity for cross-examination, and it is equally certain that even if the state had been served with a copy in advance of the trial, it would not have been sufficient to deter prosecution. Much more impressive, however, is the sworn testimony of Krause taken in a public trial in which his confession of guilt on the trial was tested by many hours and days of cross-examination by able legal counsel in both trials. The affidavit of Krause is entitled to no more weight or credibility than his previously entered plea of "not guilty."

II. THE PROSECUTOR DID NOT USE PERJURED TESTIMONY KNOWINGLY OR RECKLESSLY.

1. *As pointed out in subdivision I of this brief, it is clear that Krause's testimony was not perjured. Consequently any charge that the prosecutor knowingly or recklessly used perjured testimony must fall, since the essential element of the charge is lacking.*

Moreover, it was admitted by counsel and found by the district court as well as the court of appeals, that the prosecutor did not knowingly use perjured testimony. The

district court said: "* * * It is clear that (special prosecutor) Mount did not believe that Krause's testimony was perjured testimony. Hence, the petitioner fails to prove one of the essential elements, that is, the knowing use by the prosecuting attorneys of perjured testimony" (R. 43).

The decision of the court of appeals states: "* * * [W]e have reviewed the strongest evidence which the appellant claims proves misconduct by the prosecutor. Our conclusion, above, that the evidence supports the court's finding that the prosecutor thought that Krause told the truth at Sawyer's trials, answers this contention."

Counsel contend, however, that the prosecution induced Krause to turn state's evidence by promises of immunity and parole and infers that the prosecutor knew or ought to have known that Krause's testimony would, therefore, be false.

However, counsel seeks to extend the limitations of the decision of this Court in *Mooney v. Holohan*, (1935) 294 U. S. 103; *Hysler v. Florida*, (1942) 315 U. S. 411; and *U. S. v. Spadafora*, (1952) 7th Circ. 200 F. 2d 140, and relies upon *Jones v. Kentucky*, (1938) 97 F. 2d 335.

The cases cited by counsel, in support of their contention that *Mooney v. Holohan, supra*, has in fact been broadened to include cases in which there was something less than a "knowing use of perjured testimony," do not apply to the instant situation.

Jones v. Kentucky, (1938) 97 F. 2d 335, must be regarded as limited to the unique factual and legal situation there involved. A defendant charged with first-degree murder was brought to a very hasty trial represented by

counsel appointed by the court, who was denied a ten-day postponement for the purpose of preparing the case. The accused went to trial on the tenth day following the indictment, which was found on the fourth day after the alleged crime. The witnesses for the state were a six-year old girl who testified to a threat of killing by the defendant and a woman of ill repute who testified to the slain woman's dying declaration.

By an odd combination of legal circumstances, the state courts got into a position where they were powerless to relieve against a death sentence, and the governor of the state, by reason of a previous general pledge, felt bound not to exercise clemency.

At some point after the trial and during the various appellate steps, newly discovered evidence showed that the little girl who testified was probably not competent to testify and that the other state's witness was acting under duress. In fact, the attorney general of Kentucky became convinced that there was grave doubt of the sufficiency of the evidence.

The supreme court of Kentucky denied writs of *habeas corpus* and *coram nobis* on jurisdictional grounds. The U. S. district court hesitated to assume responsibility for overturning the solemn judgment of the state court of last resort. The U. S. circuit court of appeals felt that in view of the attitude of the attorney general of Kentucky and the U. S. district judge in relation to the newly discovered evidence that the appellate court certainly should act to prevent a possible irrevocable injustice in the execution of the petitioner. The court pointed out that had defense

counsel been granted a reasonable opportunity to prepare for trial, the exonerating evidence later discovered might have been presented at the trial, with a different result. Because of these and other surrounding circumstances, the circuit court of appeals said (p. 338):

> "The judicial processes of the state have been vainly invoked. * * * The appellant is not to be sacrificed upon the altar of a formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional right may be perceived, and the door to clemency is closed."

Surely, none of the "surrounding circumstances" present in the *Jones* case are to be found in this record. The peitioner here had able counsel, ample time for preparation of two trials, ample remedies available and used by way of appeal and, in this case, the door to clemency has not been closed. Clearly, the *Jones* case stands alone upon its own facts and has no similarity to the issues in the instant proceeding.

Hodge v. Huff, (1944) 140 F. 2d 686, also deals with the question of extension of the rule of *Mooney v. Holohan* beyond its expressed limitations. The District of Columbia court of appeals held that a mere allegation of perjury is not sufficient to render a judgment void unless the false testimony is so entwined with other circumstances as to deprive the proceeding of its character as due process of law. The court discusses the *Jones* case, *supra*, in the following language (p. 688):

> "* * * In that case, unlike the present, the prisoner, under sentence of death, made representations

which demonstrated that he had been convicted upon perjured testimony; the prosecution confessed error; the door of executive clemency had been closed; on his trial the court had denied, to the prisoner, the right to assistance of counsel, which right if granted might have revealed the perjured character of the testimony. This is a good example of a hard case which sometimes produces bad law. But whether or not that decision was proper upon its facts, it finds no counterpart in the present case. Here, when the prisoner was on trial, he was represented by experienced counsel, and the judge had full opportunity to observe the witnesses who testified for and against him. Their testimoney was subjected to cross-examination and the prisoner, testifying in his own defense, not only sharply denied the truth of the evidence given against him but testified to an alibi and offered supporting testimony thereof; as well as of his good character. Moreover, he testified that he had been having trouble with his daughter—the complaining witness—'staying out and going around with young men.' While, therefore, the issue of perjury was not presented, in express terms, at the trial it was, nevertheless, implicit in the issue of appellant's guilt or innocence; in fact, it must have been dominant in the minds of judge and jury. *Generally, newly discovered evidence which is merely impeaching in character does not warrant the granting of a new trial. This is even more true where the application is for a writ of habeas corpus.* * * * [Italics supplied.]

"* * * Consequently, the Mooney case, cited by appellant, has no relevancy to the present case. * * *"

Thus it will be seen that none of the "other circumstances," coupled with proven perjured testimony referred to in the several cases cited, are present in the instant case,

and neither the ruling of the *Mooney* case nor any of those decided after it have any application to the facts in this case which would justify a reversal by this court of the decisions of the district court and the court of appeals.

The *most* that can be said in view of the record is that Krause, in seeking to curry the favor of the state for his own interests, may have had a motive to testify falsely if, indeed, false testimony was necessary, but it is just as logical to assume that the same self-interest may have motivated Krause to confess the *truth*, even at the cost of his own self-incrimination.

2. *The state had no understanding or agreement, and made no threat or promise, express or implied, as to Krause's testimony.*

The testimony of Special Prosecutor Mount (R. 157), corroborated and supported by the affidavit of Anne McClure (R. 21) and the testimony of District Attorney McCauley (R. 90), stands unimpeached and uncontradicted in this record. From this evidence and other matters of record, the following facts are established.

About a month before the first Sawyer trial, Mount was informed that Krause was willing to testify and confess his guilt in the Sawyer case. The case had already been set for trial and a motion by the state to consolidate the indictments against both Krause and Sawyer for the purpose of trial had been granted by the court.

The state secured a court order transferring Krause to the county jail at Milwaukee so that he might be present

at the trial and for the purpose of interviewing him in advance. Mount saw Krause but twice before the trial and on each occasion took his statement in the presence of a stenographic reporter in the district attorney's office. In his transcribed statement, as appears from Anne McClure's affidavit, Krause said that he was making a statement voluntarily and without any threats or promises by the prosecutor; that he "wanted to come clean with everything"; that he realized his admissions could be used against him. From the affidavit of Anne McClure, it also appears that Mount offered no inducement for Krause to testify; that Krause made no demands for immunity, leniency, clemency, or for dismissal of pending charges, and that Mount offered no such consideration; that the subject was never mentioned or discussed at either interview; that there was no mention or discussion of the question of parole or any similar subject and that "Mr. Mount made no suggestion or offer, either direct or implied, of being of any assistance to Mr. Krause in any manner whatsoever" (R. 24).

McCauley testified that he never spoke to Krause after his indictment except to say "hello" on two occasions when he entered the courtroom during the first trial (R. 91).

Mount also testified that at the first Sawyer trial Krause seemed well aware of his legal rights since even after the court granted the state's motion to *nolle* the charges against Krause, which enabled the state to call Krause as a witness, he, Krause, refused to give incriminating testimony until ordered by the court on motion of the state (R. 160, 163-164). This brought Krause within the protection of sec. 325.34 Wis. Stats., granting him immunity from prosecution *except for perjury* (R. 159, 164).

Mount testified that he did not demand a "guilty" plea from Krause in the Sawyer case because he had no doubt of the truth of Krause's confession and that he regarded such procedure as an idle gesture, since Krause would gain immunity by *operation of law* immediately after answering a question under oath upon the order of the court (R. 163-164).

It is quite true that the state could have rejected Krause's proffered assistance and compelled him to stand trial with Sawyer: but careful and conscientious consideration of the interests of justice dictated otherwise. Krause, the tempted and corrupt public official, was already convicted and incarcerated for one crime of bribery and under indictment for several others. Assuredly, he would never again hold public office nor be in a position to betray a public trust. But the accused tempter, the corrupter of government, was still at large, and if he escaped punishment, would be free to tempt and corrupt as many more Krauses as his private interests might require. Should the state take the chance of letting Sawyer go free so that one more sentence might be imposed upon Krause, who was no longer a source of danger to society? Obviously, we had no difficulty whatever in making the decision to accept Krause's testimony, knowing that he would thereby gain immunity. We were convinced of Sawyer's guilt and of Krause's complicity, and after checking Krause's confession with all the other evidence in the case, all reasonable doubt was dispelled. We respectfully submit that the record itself completely justifies the course of action pursued by the prosecution and vindicates the prosecutors of improper or illegal motives.

3. *It is asserted by counsel that the prosecution concealed from the court an alleged agreement with Krause and, in connection therewith, that the prosecutor lied to the court.*

We shall ignore the personal insult thus directed at the prosecutor and deal only with the facts. Counsel are referring, of course, to the opening of the first trial, because by the time of the second trial, Krause had obtained his parole and all cases against him had been disposed of. All facts in relation thereto were gone into before the jury in the second trial and were the subject of cross-examination and lengthy argument to the jury.

At the opening of the *first* trial, the prosecutor presented a request to the court for permission to *nolle* counts 1 and 2 in the indictment against Krause relating to the Sawyer matter "for the reason that it will be necessary, in the interests of justice, to use the said defendant as a witness in the prosecution of said joint trial." Before the court ruled on the request, petitioner's lawyer said (Ap. A. 143-144; *State v. Sawyer*, Aug. Term 1952, State No. 24):

> "We make this suggestion, Your Honor, that we think the record should show what, if anything, the state has done so far as the other three counts in that indictment are concerned."
>
> "Mr. Mount: It is immaterial, but I presume they will be called at the proper time in their order for disposition."
>
> "Mr. Podell: If it please the Court, that may be well and true but at the same time *that issue will be a main issue in the trial—the question of veracity and so forth —the question as to whether promises and so forth were made;* * * * I think we ought to know at this

time so that we are not barred by the Court one way or another and they are not barred * * *."

"Mr. Mount: I think you will have an opportunity when Mr. Krause takes the stand to examine him as to whether there has been anything improper."

"Mr. Podell: Well, I may be barred, if I don't know now, you see what I mean. If I know now, I know how far I can go. If that is a part of this nolle, we ought to know. If it isn't a part, if the state doesn't intend to, we would like the record to show that now."

"Mr. Mount: I will state for the record now that no promises or threats have been made to Mr. Krause."

"Mr. Podell: I don't mean that. I say is it the intention of the state to drop the other cases also in consideration of his testimony for this nolle. Is that a part of this?"

"Mr. Mount: We have no such intention. It is not material, but we have no intention or conclusion as to what we are going to do with the other three counts in this indictment."

"Mr. Podell: In other words, I understand you don't know at this time. You don't know what you are going to do yet with the counts."

"Mr. Mount: We don't know what is going to develop. We don't know what the plea is going to be particularly—that may be changed. We have no idea. We can't try those cases now."

The court then granted the motion of the state to *nolle* the first two counts in the indictment against Krause (Ap. A. 145).

The foregoing colloquy indicates that the state had not made any commitments as to the disposition of other counts

against Krause. At the time we had no indication whether Krause would stand trial on the remaining counts or plead guilty. For all we knew, he may have had in mind turning state's evidence in some of the other cases as well. We were going to cross that bridge when we reached it. But the prosecutor spoke the truth when he said that the state had not determined its future course of action and that it certainly had no present intention of dismissing the remaining charges against Krause. The reasons why the state subsequently disposed of Krause's charges in the manner in which they were handled will appear later in this brief, but the fact remains that the state did not conceal any agreement or understanding with Krause because none existed. The same charge of suppression as to Sawyer's *second* trial is clearly unfounded since at that time all the facts were before the court and jury (A. Ap. 193-194, 234-235, *State v. Sawyer*, Aug. Term 1953, State No. 17).

4. *The statements and actions of the prosecutors in disposing of Krause's remaining charges nearly two months after the first Sawyer trial are not proof in any degree of a pre-existing understanding with Krause as to such disposition.*

Counsel try desperately to establish some connection between Krause's testimony at the first trial and the later disposition of his pending charges since this is indispensable to his attempt to bring this case a little closer to the rule of *Mooney v. Holohan*, (1935) 294 U. S. 103.

In the court of appeals record, pages 179 to 188, there appears a complete transcript of the proceedings in the

municipal court of Milwaukee county, Hon. Gerald J. Boileau of Wausau (a circuit judge), acting municipal judge, held on June 2, 1952, a month and a half after the first Sawyer trial. At that time four outstanding charges were disposed of by the court. Judge Boileau was the trial judge in both the Krause case and the first Sawyer case, as well as in a number of others arising out of indictments returned by the same grand jury and by another grand jury called in Kenosha county.

On the occasion set forth in the transcript, the reasons for the recommendations of the prosecution were fully and fairly stated and the court likewise made clear the reasons for his action.

The three charges which were *nolled* were matters which came before the grand jury and were apparently regarded as sufficiently serious to justify the return of an indictment, or at least to be included as additional counts in an indictment. But when the time came to prepare them for trial, it was concluded that the evidence available was insufficient and that in all probability a prosecution would fail. The proof necessary to establish grounds for the return of an indictment and that required to convince a trial jury beyond a reasonable doubt are quite different, as every prosecuting attorney well knows. We have no doubt that these three counts would have been *nolled at any time* they were called for trial after Krause's conviction. However, the prosecution was not prepared to make a statement to that effect at the opening of the first Sawyer trial, since up to that time no steps had been taken to assemble the evidence and prepare these cases for trial. The decision of the supreme court in Krause's appeal (*State v. Krause*,

(1951) 260 Wis. 313), which raised jurisdictional questions, had been handed down only a few months before and other cases had been prepared and scheduled for trial in the meantime.

As for the bribery charge to which Krause pleaded guilty on June 2, 1952, the record shows (R. 182) that the state was ready to proceed to trial almost immediately—"at any short notice." But Krause changed his plea to "guilty," and we did what ordinary fairness and justice seemed to indicate—we recommended leniency, for which position we make no apologies. Except in aggravated cases, it is common practice to deal more leniently with one who freely confesses his guilt and displays some signs of repentance. It was quite apparent, as pointed out by the court, that incarceration in the state prison had changed Krause's attitude and that the interests of justice did not require additional penalties.

We wish to make it quite clear that we hold no brief for Mr. Krause. He was and is a convicted and confessed bribe taker, a man who betrayed a public trust; and in his attitude of defiance and disdain of the law before and during his trial, no decent citizen could regard him with anything but contempt. However, many courts, including this Court, have frequently admonished judges and prosecutors against permitting their natural aversion, even to those guilty of the most heinous crimes, to distort their sense of justice into a denial of equal justice and equality of rights before the law.

In a number of bribery cases, Judge Boileau had theretofore invariably imposed sentences of from one to two or

three years and, regardless of the number of counts, had ordered sentences to run concurrently. On the occasion in question, Judge Boileau stated:

> "* * * I feel quite certain that had both cases been tried at the same time, that I would have imposed concurrent sentences. * * * I make the statement for the information of the Parole Board" (R. 188).

Here was Krause, who, by reason of an appeal taken in good faith upon substantial grounds, could not be brought to trial upon the remaining counts until the appeal was decided. To penalize him for taking an appeal by imposing a sentence which, even with probation, would lengthen his imprisonment by nearly two years, simply offended our sense of fairness and justice and Judge Boileau's as well. To say now, as counsel contends, that our attitude in relation to the disposition of charges against Krause is clear proof that we were thereby paying "the full price" for Krause's "perjured" testimony against Sawyer is unwarranted and unfounded conjecture.

We have no way of knowing what Krause said to others about the disposition of his cases, and we certainly had no way of controlling his statements. Considering the sources, we are not prepared to believe many of the statements attributed to him. That he would try to gain some advantage by offering to confess his guilt is understandable; but that he could succeed in obtaining consideration beyond that guaranteed him by law is inconceivable.

On pages 24 through 35 of his brief, counsel continue their intemperate and irresponsible charges. Some of them cannot be permitted to go unchallenged. If their charges

are true, it must be assumed that we were in a position to control the judicial discretion of Judge Boileau and the official actions of the Wisconsin parole board, a branch of the state department of public welfare. The very suggestion is ridiculous. Punishment for crime is the exclusive function of the courts and parole is the exclusive function of a state department.

Wight v. Rindskopf, (1877) 43 Wis. 344, 350, is cited on page 34 of petitioner's brief and quoted from at great length thereafter. The case has never again been cited in subsequent decisions of the Wisconsin Supreme Court on the point at issue. As a matter of morals and ethics, we subscribe to every word and sentence of that decision. As a matter of law, however, it has been somewhat circumscribed by sec. 325.34 Wis. Stats. (immunity statute) which was adopted in 1945. Chief Justice Ryan clearly approved an agreement by a public prosecutor with an accomplice witness to grant him "immunity upon the indictment upon which he testifies" (43 Wis. at p. 353). The "sanction of the court" as required by the *Wight* decision is exactly what is now required by the statute. The decision (43 Wis. at pp. 354-5) makes clear a point which was made in this brief that *"without the sanction of the court, it is difficult to understand how such an agreement could be kept"* (referring to an agreement by a prosecutor to grant immunity in cases other than the one in which defendant testified). *"For while the court is not privy to the bargain, the fulfillment of it largely depends upon the court."*

In *Black v. The State,* (1884) 59 Wis. 471, the court held that where an accomplice was induced to testify by reason of immunity offered, such fact did not render the

witness incompetent, "*but only went to his credibility and that was a question for the jury.*"

5. *We cannot pass without comment the many distortions of fact appearing in subdivision I of petitioner's brief, beginning on page 23.*

The mis-statements of the record are, of course, inexcusable and can be explained only by the urgent necessity to bring the facts in this case within at least hailing distance of the situation in *Mooney v. Holohan*, 294 U. S. 103, and *Jones v. Kentucky*, 97 F. 2d 335.

On page 24 counsel state: "Krause stated that he was going to perjure himself and defended his right to do this on the ground that he had to get out of prison, and this is the reason he made a deal with the prosecution to make this perjured testimony if they would drop all of the remaining criminal charges against him so that he could make parole." There is no testimony in the record whatever to support the foregoing statement. The most Krause ever said to any one was that he was going to change his story.

Also on the same page it is asserted that Krause "revealed to Hemmy his corrupt and criminal scheme to testify falsely against Sawyer when he had in fact not been bribed by Sawyer;" Hemmy did not so interpret Krause's remarks. In his own testimony (R. 80, 81-82) Hemmy under cross-examination said:

> "I don't know whether I came to a conclusion that this man was asking me to become a party to offering

perjured testimony; I just didn't want anything to do with it. That is all.

"Q Had you felt that this involved perjury on the part of Mr. Krause or a request for subornation on your part you would of course have reported it, wouldn't you?

"A Well I don't know how to answer that question, Mr. Mount. If it was a serious enough matter I might report it.

"Q However, you did not regard it as sufficiently serious?

"A Not at the time, no."

The most Hemmy would say on this subject was that he could not determine whether Krause had told the truth in his affidavit denying guilt or whether he was telling the whole truth at the time of this interview.

On page 25 counsel assert that the "District Court ultimately sustained the objections to the Knoll and Hemmy testimony, struck it from the record and refused to consider it in dealing with the questions of perjury * * *." A mere examinaion of the district court opinion will show that the court did not reject Knoll's testimony (R. 41-43).

On page 26, counsel complain of their inability "to force a prosecutor to admit that the prosecutor knew that the testimony was perjured at the time it was introduced." The statement is ridiculous on its face and needs no comment.

On page 31 counsel assert again without any support in the record that Krause told Knoll "that he was going to testify falsely against Sawyer in order to obtain his

freedom." Knoll made no such statement. Knoll said: "* * * Krause never said anything to me that his new version, or his new testimony that he did accept the bribe was the truth; he never mentioned anything like that to me * * *" (R. 68). On cross-examination he testified:

> "Q I understand you to say that he never said to you whether his new version of the facts in the Sawyer case was true or false; that was your testimony wasn't it?
>
> "A Well he never told me that it was true; he always justified his change on the basis that it was expedient.
>
> * * *
>
> "Q * * * In other words, whether it was true or false was a deduction on your part and not the result of a statement by Mr. Krause that it was true or false?
>
> "A Well he never said it was true" (R. 70-71).
>
> "A * * * Krause attempted to justify his intention to testify as a state's witness in the Sawyer trial; that is correct. *And I concluded from that that he was doing something wrong*" (R. 73).

In an attempt to make *Woolomes v. Heinze* (9th Circ.) 198 F. 2d 577, applicable, counsel insist throughout that the prosecution concealed an alleged arrangement with Krause whereby he would be granted immunity in exchange for his testimony. All of the credible evidence in this case, as well as all reasonable inferences to be drawn from such evidence effectively contradict this claim and both the district and appellate courts so held. Counsel's conclusion, therefore, at the bottom of page 34, is manufactured out of whole cloth and is no more than an attempt

to create by words a factual picture, which the record does not support.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL AND IN THAT CONNECTION THAT HE WAS NOT DENIED DUE PROCESS OF LAW.

1. *This question was presented to this Honorable Court by petition for certiorari on a previous occasion. (Sawyer v. Wisconsin, (1954) 348 U. S. 855, rehearing denied 348 U. S. 890.)*

The reasons advanced on this petition are identical with those presented in the former petition with the exception of the affidavit and testimony of Attorney Charles Geisenfeld taken at the hearing in the district court (R. 133-146, 190-191). We submit, in view of Mr. Geisenfeld's record in this case, in which he has played a rather prominent part not only as a lawyer for petitioner but as a convenient and accommodating witness on his behalf, that his testimony is not entitled to any weight or credibility whatever.

It is now asserted *for the first time* that Attorney Geisenfeld made numerous *oral* demands for trial upon the district attorney and the special prosecutor from the date of indictment to the time of trial (R. 191, 133-134, 137, 139, 141-142, 143, 145). It is also asserted that since neither the district attorney nor the prosecutor made any specific denial of Geisenfeld's testimony in the district court, that it now stands as a verity. We call the attention of the court

to the fact that in every brief filed by the state in this matter in which the subject of speedy trial was discussed we have continuously asserted that petitioner's counsel *never made a demand for trial.*

In appellant's brief in the first appeal (Aug. Term, 1952, State No. 24) (pp. 23-29), there is no claim of any demands by the defendant for trial. In the state's brief in the first appeal (p. 17), it is stated "'nor was any demand for trial ever made by the defendant.'" In appellant's reply brief in the same appeal (pp. 3-5) reference is made to the state's claim that there was no demand for trial, but there is no denial of such claim nor any claim to the contrary. In appellant's brief on motion for rehearing in the same appeal, which was devoted *entirely* to the subject of speedy trial, defendant discussed the holding of the supreme court that he had taken no affirmative steps to procure a trial, but there was still no claim that any demands for trial had been made. The only claim made (p. 11) was that the defendant did not attempt "'to postpone or delay the trial." In the state's brief on motion for rehearing (p. 7) it is again asserted that the defendant failed "to demand a trial." In the defendant's reply brief on motion for rehearing (p. 5) the only answer made to the state's assertions that defendant failed to demand a trial was the vague assertion that "the defendant employed the approved procedure by moving to dismiss and in addition took such other steps as would have resulted in a trial" etc.

At the time of the hearing on motions to dismiss on March 20, 1951, the record of the proceedings at that time (pp. 54-55, *infra*) was made and transcribed in the case of *State v. Krause, supra*, and by stipulation of counsel, it

was agreed that all proceedings taken would apply to all cases then before the court, which included the Sawyer indictments. This record is set forth in the record of *State v. Krause* (R. 454) and copied verbatim in the state's brief in opposition to the motion for rehearing in the first (Sawyer) appeal (pp. 4-5). The same material appears again in the state's brief as respondent in the second appeal (pp. 49-50).

On March 20, 1951, the special prosecutor made a statement to the court regarding the delay in bringing the matters on for trial. In the course of that statement the prosecutor said, "The defendants themselves made no effort whatever to bring the matters on for hearing." This related exclusively to the Sawyer matters, since he was the only defendant who raised the issue of denial of speedy trial. After the prosecutor's statement, the court said: "I take it nobody desires to be heard further in that matter." Mr. Geisenfeld, then representing Mr. Sawyer, made no reply to the prosecutor's remarks, but proceeded to discuss an entirely different objection. Geisenfeld's silence in the face of an assertion that defendant made no effort to obtain a speedy trial must, in law, be construed as an assent to the truth of the prosecutor's statement. Had Geisenfeld prior to that time made the many demands for trial which he now asserts, he should have then and there contested the assertion of the prosecution to the contrary.

In the petitioner's brief on the second appeal (Aug. Term, 1953, State No. 17) no claim is made that repeated demands for trial were made. In the state's brief (pp. 49-53) the prosecution again asserted: that defendant took no affirmative action; that defendant failed to move for or

demand trial; that defendant could have filed a petition for *habeas corpus* or by a simple letter to the prosecutor or to the court have demanded a trial. In defendant's brief on motion for rehearing in the second trial, the record is again exhaustively discussed (pp. 3-9) and no claim is made of any demands for trial and no denial is made of the state's repeated assertions that no such demands were made. In the state's brief in opposition to rehearing on the second appeal (p. 2) it is again asserted, "The fact remains that the defendant did nothing of a substantial nature to bring this matter on for trial although many remedies were open to him for that purpose."

In petitioner's first petition for *certiorari* (No. 147, served June 29, 1953) petitioner states (p. 11), "Petitioner took the only actions open to him—, that is, a move to dismiss and ask for an immediate trial." The latter statement refers, of course, to the filing of a waiver of jury and consent to trial by the court. There nowhere appears in the entire document any claim of demands for trial as asserted by Geisenfeld.

In petitioner's second petition for *certiorari* (No. 279) the brief is silent as to any claim that trial was demanded. In the state's brief in the same matter in opposition to the petition, it is again asserted (p. 10), that "no one had requested a trial and the state had not been responsible for the delay"; (p. 11), "nor was there any affirmative action on the part of the petitioner to obtain an earlier trial"; (p. 12), "It must now be concluded that the petitioner waived his right to an earlier trial by failing to move for or demand a trial or to take any other effective, affirmative action in that direction." Although the petitioner filed a

reply brief to the foregoing brief of the state, there was still no denial of the state's assertions and no claim that any demands for trial had been made.

It is now contended that the district attorney and the prosecutor should have specifically, and under oath, denied Geisenfeld's testimony. The fact is, however, as appears from the foregoing statements from the briefs and records, that the prosecution has consistently and continuously denied the very facts testified to on numerous occasions and has met with no contradiction by the petitioner or his attorneys until the last ditch effort of Mr. Geisenfeld to bolster the record in its weakest spot.

The only delay requested by the state came on the morning of the Krause trial, June 5, 1951, when a jury panel was present and the state was ready to proceed and did proceed forthwith in the Krause trial.

2. *No federal question is presented.*

Before arguing the merits of this question, we wish to point out that no authority has ben cited to show that the alleged deprivation of the defendant's right to a speedy trial violates any provision of the United States Constitution so as to raise a federal question. It has been determined by the Supreme Court of Wisconsin that the state constitutional provision guaranteeing the right to a speedy trial was not violated. It is the position of the respondent in this case that the Federal Constitution does not guarantee the right to a speedy trial in state prosecutions.

In *Gaines v. Washington*, (1928) 277 U. S. 81 it appeared that during the course of a state criminal trial the presiding judge stated that "beginning tomorrow" the general public would be excluded from the courtroom. It was contended that this order violated the 6th Amendment guarantee of a "speedy and public trial," which is the same constitutional provision involved in this case. This Court held (p. 85) that the 6th Amendment guarantee does not apply to the trial of criminal prosecutions by a state.

The Court then refused to determine whether the 14th Amendment requires a public trial in a state prosecution because in that case the Supreme Court of Washington had found on the record that the trial judge's statement had not been carried out and that the public had been admitted to the courtroom to the extent of its seating capacity.

We know of no case which directly holds that the 14th Amendment requires a "speedy and public trial" in a state criminal prosecution.

In *United States ex rel. Hanson v. Ragen*, (CCA 7th 1948) 166 F. 2d 608, 610, it seems to have been conceded that the right to a speedy trial is guaranteed by both the United States and the state (Illinois) Constitutions, in a state prosecution. No such conceession is made here.

That the 14th Amendment has not absorbed the first 8 Amendments as such is well established.

Wolf v. Colorado, (1949) 338 U. S. 25, 26;

Adamson v. California, (1947) 332 U. S. 46.

3. Petitioner was not in fact denied a speedy trial.

On April 26, 1950, the defendant was apprehended and brought into court pursuant to a *capias* issued upon return of the indictment by the grand jury. *At the request of defendant's counsel, the court deferred arraignment until further notice and the defendant was admitted to bail.* After the grand jury concluded its deliberations in November 1950, the cases were set for trial in the order in which the defendants had been indicted. Sawyer and Krause and other defendants were arraigned at a time fixed by the court, namely, February 7, 1951. *There was no request for arraignment before that time.*

At that time, an affidavit of prejudice against the municipal judge of Milwaukee county was filed by Sawyer. On February 27, 1951, the Hon. Gerald J. Boileau, a circuit judge, of Wausau, Wisconsin, about 200 miles distant from Milwaukee, assumed jurisdiction of both the Sawyer and Krause cases, and on the same date both defendants filed motions to dismiss, based upon almost identical grounds. Judge Boileau set March 20, 1951 as the date for arguments on the motions to dismiss. On March 1, 1951, the defendant Sawyer had filed an amended motion to dismiss. At the time of the argument on such motion (March 20, 1951), the defendant Sawyer was in court, represented by Attorney Geisenfeld. It was then stipulated by all counsel that the testimony to be offered by the several defendants relative to the motions would be effective in all of the cases then before the court. In addition to the identical questions raised by Krause as to the validity of the impaneling of the grand jury and the jurisdiction of the municipal

court, Sawyer raised the question of the denial of a speedy trial. At the time of the argument on the motions to dismiss, the following statements appear in the record:

> "MR. MOUNT: One further objection is made, although it is not framed in the language of an objection. The affidavits all state that these defendants were indicted at various times after February, March, April, and so forth, in 1950, and were not brought on for araignment until February, 1951,—inferring that the defendants have been denied a speedy trial.
>
> "Of course, the fact is, and the record will show, that when the defendants were apprehended pursuant to the capias issued under the indictment they were brought into court and declined arraignment at that time. They were released on bail, and the Court said, 'Gentlemen, whenever you are ready to bring these up, let the Court know.' I think that is what the record says, 'And we will set a time.' The defendants themselves made no effort whatever to bring the matters on for hearing.
>
> "We moved in November, and then found the calendar so clogged with trials in the Municipal Court that we could not proceed until January. So that there has been no act of delay on the part of the state, and the defendants didn't appear to be in any hurry either. I don't think that they can be heard to object to the delay."
>
> "THE COURT: I take it no party desires to be heard further in that matter."
>
> "MR. GEISENFELD (Mr. Sawyer's attorney at the time): May it please the Court, I have this further matter that pertains to Mr. Sawyer, on, I think it is either the last or second last point I raised objection in the motion to dismiss as to statement issued by the

> Foreman of the grand jury and Mr. Mount with reference to immunity in Mr. Sawyer's matter. * * *" (Quoted in Resp. Br. on motion for reh., *State v. Sawyer*, Aug. Term, 1952, State No. 24, pp. 4-5.)

No further reference was made to the objection that Mr. Sawyer had been denied a speedy trial.

The case was then continued for cause but not on motion of the prosecution, until June 5, 1951. On June 5 the state's motion to consolidate the Krause and Sawyer cases for trial was granted, and at the same time the trial of another bribery case against Krause was commenced and proceeded to judgment. Krause took an immediate appeal to the Supreme Court of Wisconsin, raising all of the issues contained in his motions to dismiss. These included all but one of the grounds asserted in the petitioner's motion. It was at least tacitly, if not formally, agreed by all defendants and the court that no further trials should be had until the issues relating to the validity of the grand jury had been determined by the Supreme Court in the *Krause* case.

State v. Krause, (1951) 260 Wis. 313, was decided in December 1951, and remanded to the municipal court early in January 1952. Thereafter, Judge Boileau promptly set April 15, 1952, as the date of trial of the Sawyer case. The record discloses no motion or request of any kind by Sawyer that he be brought to trial. He did file a waiver of jury and consent to immediate trial *by the court*, which is urged by counsel as evidence of a "demand" for trial, but the waiver of jury was objected to by the state and sustained by the court. It must be regarded, therefore, as a *conditional* statement which was nullified by the state's objec-

tion and the court could not assume that Sawyer was then ready for a *jury* trial.

The only request ever made to the court by the state for a delay in the Sawyer trial was on June 5, 1951, at which time the Krause case was scheduled to proceed and did immediately proceed to a jury trial. The record also shows that when the Sawyer case was called for trial in April 1952 after the jurisdictional questions had been settled by the Supreme Court, *that the defendant went to trial without any further objection on the ground of delay* although another year had elapsed. It seems quite clear that he then waived the objection, since he never preserved his right by renewing his motion to dismiss before proceeding to trial. (See *State v. Ketchum*, (1952) 263 Wis. 82.)

The *trial record* of the first trial now in evidence discloses no motion either oral or written made on the part of the defendant at the time of trial to dismiss the case for denial of a speedy trial. Counsel did move for a severance of the cases, which motion was denied by the court. It is significant also that at the time of the first trial (R. 90), Krause's attorney demanded a jury and Sawyer's attorney had previously waived it. It was not until after the jury had found the petitioner guilty that counsel, on appeal, again raised the objection of denial of a speedy trial. It was not referred to even in the motions after verdict (Ap. A. 128-129, 139-141).

Moreover, in connection with the second petition for *certiorari* to this Court on the ground of denial of a speedy trial, Geisenfeld executed a supporting affidavit which says nothing about the repeated demands for trial to which he

testified in the record in the district court (R. 144-145). The conclusion is inescapable that Geisenfeld never made the "repeated demands for trial" which at this late date he suddenly recalls.

In *State v. Sawyer,* 263 Wis. 218, the supreme court dealt with this phase of the case and held (p. 224):

> "We are of the opinion that the defendant, as a condition precedent to requesting dismissal of the criminal charge pending against him on the ground that he has been denied his constitutional right of a speedy trial, must first have taken some affirmative action demanding that the case be brought on for trial. *This the defendant in the instant case did not at any time do.*" (Emphasis added.)

In *State v. Sawyer,* (1953) 266 Wis. 494, this issue was again raised and the court held (p. 497):

> "BROWN, J. On this appeal Sawyer renews the contention which he made when the case was first before us, namely, that the judgment should be reversed and the indictment dismissed because the delay between the grand jury indictment, April 25, 1950, and his trial which began April 15, 1952, was so long that it denied him the right to a speedy trial as guaranteed by sec. 7, art. I, Wisconsin constitution and amendments V and XIV, United States constitution. This contention was considered and disposed of upon the first appeal, *State v. Sawyer,* supra, pp. 223-225, and is now *res adjudicata.* The state and federal constitutions guarantee a *right* to a speedy, public trial but they do not compel one unless the person accused claims the right. The speedy trial is there for the asking, but the person charged with crime is required to

ask for it before he may complain that it has been denied him.

"'While there is some authority to the contrary, the general rule is that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to entitle him to a discharge on the ground of delay, at least when accused has been admitted to bail, or is not within the custody of the court.' 22 C. J. S., Criminal Law, p. 719, sec. 469.

"Sawyer was free on bail. He made no demand but acquiesced in such delay as there was. Though in restrospect he considers the delay was unfavorable to him, we conclude for the second time that he was not deprived of a constitutional right."

The U. S. District Court in the instant case (129 F. Supp. 687, 692-693) held that under federal decisions, "the right to a speedy trial is relative and depends upon surrounding circumstances" (R. 32).

Beavers v. Haubert, (1904) 198 U. S. 77, 87;

United States ex rel. Hanson v. Ragen, (1948) 7th Cir., 166 F. 2d 608, 610.

"Such surrounding circumstances are—petitioner Sawyer was not confined to jail during the interval between indictment and trial; grounds urged by petitioner for dismissal of the charges against him were being tested out before the Wisconsin Supreme Court on the appeal of the Krause case; petitioner filed an affidavit of prejudice against the Municipal Judge, thus necessitating the calling in of an outside Circuit Judge; no specific demand was made to the *Court*, asking or demanding a speedy trial, and the filing of a consent to an immediate trial coupled with a waiver of a trial

by jury, not being sufficient for that purpose in view of the State objection, approved by the court, of a waiver of jury trial.

"I conclude that a Writ of Habeas Corpus should not be granted on the basis that petitioner was deprived of due process of law under the 14th Amendment of the Federal Constitution because of his claim that he was deprived of a speedy trial" (R. 32).

At this point we must again call the Court's attention to mis-statements of fact in counsel's argument on this subject. On page 35 it is asserted, "In the period between the indictment and the first trial of petitioner, petitioner on *several* occasions filed motions to dismiss the indictment because of unreasonable delay in bringing him to a speedy and public trial * * *." The record shows but *one* such motion as to which petitioner filed *one* amendment. A little later on the same page it is stated that petitioner "filed a printed form which waived trial by jury and consented to an immediate trial before the court. *The prosecution objected and the court sustained the objection.*" Thus it is made to appear that the prosecution objected to an *immediate trial* which was not at all the case. What the prosecution objected to, as the record shows, was the waiver of trial by jury and this objection was sustained.

At pages 35-36 it is asserted: "Nevertheless, the case was delayed and *not called for trial until about a week after the prosecuting witness, Krause, had conferred with the District Attorney* and made arrangements with him to accept his changed and perjured testimony in return for granting Krause immunity and dismissing other indictments pending against him." This is perhaps the most

reckless and irresponsible statement in a brief which is distinguished chiefly by its profuseness of diatribe and invective directed against the prosecution. The fact is, as the record shows, that the case was called for trial late in March, 1952. The prosecutor had no conference or communication with Krause until April 7, 1952. As to the promises of immunity and other favors alleged in the foregoing quotation, we refer this Court to the affidavit of Anne McClure (R. 21), the testimony of Special Prosecutor Herbert L. Mount (R. 157) and the testimony of William J. McCauley, District Attorney (R. 90).

Similarly at the bottom of page 37, it is asserted: "The state arranged its deal on or about April 7, 1952, with Krause. A week later the prosecution was ready for trial for the first time!" This statement is pure fiction since the record itself demonstrates its falsity. The state had issued other subpoenaes long before April 7th for witnesses in this case.

On page 38 it is asserted that Krause "with the prosecution's permission moved to California." The prosecution in this case had nothing to do with the disposition of Krause's affairs after his conviction by the court. The State Department of Public Welfare is the only agency in Wisconsin which has a right to grant such permission and presumably did so in this case. Wis. Stats., sec. 57.13. District Attorney McCauley testified he was not consulted about it nor did he communicate with the State Board of Parole or State Department of Public Welfare in any manner with reference to the terms and conditions of Krause's parole (R. 90, 91).

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE EXCLUSION OF PAUL HEMMY'S TESTIMONY BY THE DISTRICT COURT WAS NOT PREJUDICIAL SINCE IT "WAS MERELY CUMULATIVE, AND SUPPORTED RATHER THAN CONTRADICTED THE LOWER COURT'S FINDINGS."

We are in complete agreement with the apparent view of both the district court and court of appeals that the testimony of Attorney Paul Hemmy and convict Verne Knoll is entirely inconclusive and without probative force to establish that Krause committed perjury at petitioner's trial in the state court. It follows, of course, that the admission or rejection of the testimony of either or both such witnesses is a matter of little consequence in the consideration of this petition for *certiorari*. Even if all such testimony had been freely admitted in the district court its total weight would obviously have been far short of sustaining the heavy burden of proof assumed by petitioner to establish the knowing use of perjured testimony by the prosecution and a resultant fraud upon the court.

U. S. v. Spadafora, 7 Cir., 200 F. 2d 140;

Johnson v. Zerbst, 304 U. S. 458, 468;

Hawk v. Olson, 326 U. S. 271, 278.

Nevertheless, we must, for the record, respectfully disagree with the ruling of the court of appeals that the testimony of Hemmy and Knoll was not objectionable as hearsay evidence. We believe the appellate court erroneously applied a hearsay test which would have been appropriate if Krause were a *party* to this action instead of a mere witness. The fact that Krause was also an accomplice did not

operate to change his legal status as a witness, although it might well have misled the court into an erroneous approach to the question.

In the first place the rule is well established that unsworn statements made by a witness out of court, contradictory to his sworn testimony taken in open court cannot be used for impeachment unless the witness is first confronted with such statements on the witness stand and given an opportunity to affirm or deny.

Burton v. United States, (1949) 5 Cir., 175 F. 2d 960, 965;

58 Am. Jur.—Witnesses §§ 775-780.

Krause did not testify in this proceeding.

In the second place, the rule as to admissibility of contradictory statements of *witnesses, for purposes of impeachment* is vastly different from the rule relating to admissions of *parties*. In the former case the only issue served by proof of contradictory statements is the *credibility* of the *witness*—it cannot be used to establish the truth of the *substance* of the contradictory statements, such as the guilt or innocence of a defendant.

Bridges v. Wixon, (1945) 326 U. S. 135, 153;

Southern Ry. Co. v. Gray, (1916) 241 U. S. 333, 337;

United States v. Michener, (1945) 3 Cir., 152 F. 2d 880, 885 (footnote 5);

Ellis v. United States, (1943) 8 Cir., 138 F. 2d 612, 616;

58 Am. Jur.—Witnesses § 770.

However, contradictory statements of a *party*, when proven, become *admissions*, are only incidentally impeaching in character and are substantive evidence.

In this case petitioner had the burden of proving that Krause committed *perjury* at the trial in the state court.

Hawk v. Olson, (1945) 326 U. S. 271;

Tiberg v. Warren, (1911) 192 Fed. 458;

Coates v. Lawrence, (1942) 131 F. 2d 110.

Perjury, therefore, becomes the *substance* of the alleged contradictory statements made to Hemmy and Knoll and as such cannot be established by hearsay evidence which could at most be admitted for impeachment. Perjury is a criminal offense, a felony, and it cannot be proved in a collateral action by any lesser degree of proof than would be required for conviction in a direct prosecution. Any other rule would work a manifest injustice.

The district court was apparently convinced that Knoll's testimony was hearsay and cited numerous authorities in its written opinion (R. 42-43). However, the evidence was permitted to remain in the record with the following comment by the district court judge:

> "As the effort is here made to prove alleged perjury by statements made by Krause prior to the trial and not under oath, I would perhaps be justified in striking the testimony entirely. However, I have decided to permit it to remain in the record for whatever it is worth" (R. 43).

We must conclude that both the district court and court of appeals took the view that the testimony of Hemmy

and Knoll was of little value, regardless of the question of its admissibility, for the reason that it tended to establish no more than the fact that Krause's testimony was generally unreliable. This was already established by other testimony and fully considered by trial juries and judges as well as the Wisconsin Supreme Court. In that sense such testimony was merely cumulative and relates only to the *weight* and *sufficiency* of the evidence adduced upon the trial in the state court. It requires no citation of authority to assert that this Court will not review state court judgments for reasons concerning the credibility of witnesses and the weight and sufficiency of the evidence. Rulings of the district court and of the court of appeals with reference to the testimony of Hemmy and Knoll constitute no more than "harmless error" (mostly in petitioner's favor, in fact) and petitioner having failed to show that such rulings were prejudicial to him, the decision of the court of appeals must be sustained and *certiorari* denied.

On page 45 of the petition counsel cite three cases in support of the proposition that, where a different decision may have reasonably been made from evidence erroneously rejected by the district court, the case must be remanded to the district court for a new trial. These cases are not applicable to the situation presented by this petition.

In *Johnson v. Zerbst*, 304 U. S. 458, the petitioner claimed the right to discharge on *habeas corpus* because he was denied the right to be represented by counsel. The main issue in the district court was whether he had effectively waived that right, which he denied. The district court failed to make any findings as to the alleged waiver under the mistaken belief that *habeas corpus* was not an

available remedy. This Court held that *habeas corpus* was the proper remedy if the petitioner had not effectively and intelligently waived his right to counsel. It appears, therefore, that the district court based its decision on procedural grounds and made no determination of the real merits of the controversy. A new trial was clearly required.

In *Walker v. Johnston*, 312 U. S. 275, the district court apparently tried the issues presented by a petition for *habeas corpus* on the basis of pleadings and affidavits without taking the testimony of witnesses. This Court held that *habeas corpus* cannot be tried by pleadings and affidavits alone but the whole of the witnesses' testimony must be taken ore tenus or by depositions to determine if the petitioner has sustained the burden of proof. This case is in no sense analogous.

In *Moore v. Dempsey*, 261 U. S. 86 an entirely different factual situation was presented with respect to the duty of the district court to examine into the facts set forth in a petition for *habeas corpus*. This Court held that when facts alleged in the petition showed that petitioner's trial in the state court was completely dominated by the open threat of mob action so that no trial in the true sense was had, and that the corrective process of the state, although invoked, had failed to afford relief, it became the absolute duty of the district court to examine into the facts alleged, to find whether such facts were true and whether they can be explained so as to leave the state proceedings undisturbed. We submit that up to this point in the case at bar the U. S. courts have fully discharged their responsibility and have complied with the mandate above set forth.

On page 46 counsel cite a number of cases to the effect that the issues here required a new trial and additional findings because the decision below might have been different if the rejected evidence had been admitted.

In *Sparks v. United States*, 241 Fed. 777, a *defendant* was prevented by objection from testifying to the absence of fraudulent intent on his part. An offer of proof was made and on appeal by a *co-defendant* the court held that the exclusion of testimony which might have cleared the *defendant* offering it was prejudicial error as to other *defendants* who would also have been exonerated. A new trial was therefore required.

In *Crawford v. United States*, 212 U. S. 183 the court's refusal to permit an *accused* to explain his intent in abstracting certain correspondence from his employer's files was held to be error where the prosecution claimed he did so for the purpose of suppressing evidence against himself. The excluded testimony was clearly basic to the substance of the charge and ought therefore to have been admitted.

Miller v. United States, 120 F. 2d 968, 973, involved the right of a *defendant* to testify to the absence of a criminal intent and the right to introduce statements made by third persons in conversations *with him* as bearing on such intent. The court held that such evidence was admissible and to reject it constituted prejudicial error. Obviously the rule of evidence as to conversations of a *defendant* with third persons relative to the question of his intent are considerably different and not to be compared with the question of third-party statements relating to the in-

tent of another *witness*. As pointed out by the court of appeals herein, the proof of the intent of a witness to commit perjury is not proof of perjury. In the instant case we do not even have proof of such intent, except by inference.

In *Little v. United States*, 73 F. 2d 861, 866, it was held that appellate courts may disregard "errors which do not affect the substantial rights of the parties" and that where the error is not substantial, the appellant has the burden of proving prejudice. This case discusses the history of the doctrine of "harmless error" under the code. As we understand the rule, an appellate court is not obliged to remand a case for error if it is reasonably convinced that the result would have been no different if the error had not occurred.

It is interesting to note that most of the cases cited by counsel on this subject involved error in rulings on evidence in *jury trials*. It must be conceded that the determination of whether or not a jury might have arrived at a different result if the excluded testimony had been considered is a more difficult question than the situation in the case presented by this petition where *all* of the evidence was taken by the district court subject to objection. Where as in this case, the excluded evidence was regarded by both district and appellate courts as principally cumulative of other similar testimony, the courts, themselves, were obviously in the best position to judge whether the result might have been different if the excluded testimony had been admitted.

CONCLUSION

WHEREFORE, respondent respectfully prays that this Honorable Court deny this petition for *certiorari*.

Respectfully submitted,

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